A

TREATISE

ON THE

PLEADINGS

IN

SUITS

IN THE

COURT OF CHANCERY

BY ENGLISH BILL.

IN TWO BOOKS.

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TO

THE RIGHT HONOURABLE

EDWARD LORD THURLOW,

BARON THURLOW OF ASHFIELD

IN THE COUNTY OF SUFFOLK,

LORD HIGH CHANCELLOR

OF

GREAT BRITAIN,

THE FOLLOWING TREATISE,

ON THE PLEADINGS

IN THE COURT OF EQUITY

IN WHICH HIS LORDSHIP PRESIDES,

IS RESPECTFULLY INSCRIBED.

PREFACE.

AN attempt to methodize the ſubject of the following pages has not, it is apprehended, yet appeared in print. The materials for a work of this nature, which are open to the public, are not very ample, or ſatisfactory. They conſiſt, principally, either of mere

books of practice, or of reports of adjudged cases, generally short, and sometimes incorrect. The experience of the author of the following pages has not enabled him to go much beyond those materials, and he is conscious that the work is therefore very imperfect. An unwillingness to rest his assertions on his own authority merely has induced him frequently to refer to books of no esteem; and, perhaps, the number of references is too great, unless the work is considered as an index to what may be found on the subject in other books. There

are

are, indeed, in private hands, notes of determinations, of which no reports have been yet publiſhed, and alſo notes of publiſhed caſes more accurate than the printed reports. A communication, through the bookſeller, of any ſuch notes, of any information which experience may be able to furniſh, of any hints for the better arrangement of the work, or of any cenſure of its inaccuracies, will be eſteemed a favor. If what is now offered to the public ſhall be ſo far approved, as to encourage an attempt to render it more worthy of notice, the advantages

which may be derived from any ſuch communication will be made uſe of for that purpoſe.

CONTENTS.

INTRODUCTION.

BOOK I.
Of bills.

CHAP. I.

CHAP. II.

CHAP.

CONTENTS.

CHAP. III.

III. *Of*

I. *Of*

CONTENTS.

2. *Be-*

CHAP. IV.

CONTENTS

3. *That*

CONTENTS.

CHAP. V.

CHAP. VI.

INTRO-

INTRODUCTION.

Of the manner in which ſuits are inſtituted and defended.

A SUIT, ſeeking relief or aſſiſtance from the extraordinary juriſdiction of the court of chancery as a court of equity, is commenced by preferring a bill, in the nature of a petition [a], to the lord chancellor, lord keeper, or lords commiſſioners for the cuſtody of the great ſeal, or to the king himſelf in his court of chancery, in caſe the perſon holding the ſeals is a party [b], or the ſeals are in the king's hands [c]. The bill ſo preferred may either

[a] Prac. Reg. 24. This book, and other books of practice, are only cited where no other authority occurred, or where they might lead the reader to farther information on the ſubject. The Practical Regiſter is mentioned by Lord Hardwicke, 2 Atk. 22. as a book, though not of authority, yet *better collected than moſt of the kind.*

[b] 4 Vin. Ab. 385. L. Leg. Jud. in Ch. 44. 255. 258. Jud. Auth. M. R. 182. 1 Prax. Alm. Cur. Canc. 463. Ld. Chan. Jefferies againſt Witherley.

[c] 2 Weſt. Symb. Chancery, 194. b.

complain of ſome injury, which the perſon exhibiting the bill ſuffers from ſome other perſon, and from which it is the peculiar office of a court of equity to relieve the ſufferer, and pray relief according to the injury; or, without praying relief againſt an injury ſuffered, it may ſeek a diſcovery of matter neceſſary to ſupport, or defend, an action at the common law; or, although no actual injury is ſuffered, it may complain of a threatened wrong, and, ſtating a probable ground of poſſible injury, may pray the aſſiſtance of the court, to enable the perſon complaining, to defend himſelf againſt the injury, whenever it ſhould be attempted to be committed [d]. If a ſuit is inſtituted on behalf of the crown, or of thoſe who partake of its prerogative, or for whom it is a truſtee, the proceeding is rather varied in ſtyle; the matter of complaint being offered to the court by way of information, given by the proper officer, and not by way of petition.

The bill generally requires the anſwer of the party complained of upon oath. It was always, therefore, neceſſary that it ſhould be in the Engliſh language; and a ſuit preferred in this manner in the court of chancery was termed a ſuit *by Engliſh bill*, by way of diſtinction from the proceedings in ſuits within the ordinary juriſdiction of the court, which, till the 4 Geo. II. c. 26. were entered, and inrolled, more anciently in the French or Norman

[d] Prec. in Ch. 531. 1 Atkyns, 284.

tongue,

tongue, and afterwards in the Latin, in the ſame manner as the pleadings in the other courts of common law.

To the complaint thus made, it is neceſſary for the perſon complained of either to make defence, which may be done, 1. by demurrer; 2. by plea; 3. by anſwer; or to diſclaim all right to the matters in queſtion by the bill. A demurrer admits the truth of the facts contained in the bill, or in the part of the bill to which it extends; but inſiſts, that from ſome matter of law, or ſome matter apparent on the face of the bill, the plaintiff, or perſon exhibiting the bill, is not intitled to the relief, or to the whole of the relief, he ſeeks by it. Therefore a demurrer, if allowed, prevents any farther proceedings upon the bill, or upon ſo much thereof as the demurrer extends to. But a plea, or anſwer, controverts the facts in the bill; and generally ſtates other facts, to ſhew the rights of the defendant, or perſon againſt whom the bill is exhibited. The plaintiff, therefore, may deny the truth of a plea, or anſwer, and aſſert the ſufficiency of the bill, by a replication; and thereupon proceed to examine witneſſes to ſupport the caſe made by the bill, and to invalidate the plea, or anſwer. The replication concludes the pleadings, according to the preſent [c] practice of the court. A diſclaimer, neither aſſerting any fact, nor denying any right ſought by the bill, admits no farther pleading.

[c] See book ii. chap. 6.

In an enquiry into the nature of the ſeveral pleadings, it ſeems moſt convenient to conſider them in the order in which they have their effect, and conſequently to treat, 1. of bills; 2. of the defence to bills, and therein of demurrers, pleas, anſwers, and diſclaimers; and 3. of replications.

BOOK THE FIRST.

OF BILLS.

CHAPTER I.

Of the perſons capable and incapable, by themſelves, of exhibiting a bill.

IN treating of bills, it will be proper to conſider, 1. the ſeveral perſons who are capable of exhibiting a bill, by themſelves, or under the protection, or in the name, of others: 2. the ſeveral kinds, and diſtinctions, of bills: and 3. the frame, and end, of the ſeveral kinds of bills.

All bodies politic and corporate, and all perſons of full age, not being femes-covert [a] idiots or lunatics [b], may *by themſelves* exhibit a bill of complaint

[a] The queen conſort may ſue alone. Co. Litt. 133. So may a queen dowager, though married. 2 Inſt. 50.

[b] It may ſeem, that the diſabilities ariſing from outlawry, excommunication, conviction of Popiſh recuſancy, attainder, and alienage, and thoſe which formerly aroſe from villenage and profeſſion, ought to be here noticed. Such of them as ſubſiſt do not, and the others did not, abſolutely diſable the perſon ſuffering under them

plaint in the court of chancery, excepting only the king and queen. Suits in reſpect to rights of the crown [c], or of thoſe for whom it is a truſtee, are carried on in the name of the king's attorney or ſolicitor-general [d]. As theſe officers of the crown are ſuppoſed to act in this inſtance merely officially, the bill they exhibit is by way, not of complaint, but of information to the court of the rights which the crown claims on behalf of itſelf or others, and of the invaſion or detention of thoſe rights, for which the ſuit is inſtituted. If the ſuit does not immediately concern the rights of the crown, its officers are not ſuppoſed to have any perſonal knowledge of the matter, but to depend on the relation of ſome

from exhibiting a bill. Outlawry, excommunication, and conviction of Popiſh recuſancy, are not in ſome caſes any diſability; and where they are a diſability, if it is removed by reverſal of the outlawry, by purchaſe of letters of abſolution in the caſe of excommunication, or by conformity in the caſe of a Popiſh recuſant, a bill exhibited under the diſability may be proceeded upon. Attainder and alienage no otherwiſe diſable a perſon to ſue, than as they deprive him of the property which may be the object of the ſuit. Villenage and profeſſion were in the ſame predicament.

[c] 1 Vern. 277. 370. Att. Gen. v. Vernon.

[d] See, as to the ſolicitor general, Wilkes's Caſe, 4 Burr. 2527; and, Sol. Gen. v. Warden and Fellowſhip of Sutton Coldfield, Mich. 1763, in chancery. This ſubject is particularly conſidered in part iii. ſec. 3. of a treatiſe on the Star-chamber, in the Britiſh Muſeum, Harl. MSS. vol. i. no. 1226, mentioned in 4 Bl. Com. 267. As the mode of proceeding in the court of ſtar-chamber reſembled that in courts of equity, the above-mentioned manuſcript will, in ſubſequent parts of this work, be referred to as an authority.

perſon,

perſon, whoſe name is inſerted in the information, and who is termed the relator. It ſometimes happens, that this perſon has an intereſt in the matter in diſpute, of the injury to which intereſt he has a right to complain. In this caſe his perſonal complaint being joined to, and incorporated with, the information given to the court by the officer of the crown, they form together an information and bill, and are ſo termed. But if the ſuit *immediately* concerns the rights of the crown, the information is generally exhibited without a relator [e]. Where a relator in ſuch a caſe has been named, it has been done through the tenderneſs of the officers of the crown towards the defendant, that the court might award coſts againſt the relator, if the ſuit ſhould appear to have been improperly inſtituted, or in any ſtage of it improperly conducted [f]. The queen-conſort, partaking of the prerogative of the crown, may alſo inform by her attorney [g]. An information differing from a bill in little more than in name and in form, its nature will be principally conſidered under the general head of bills, and its peculiarities will be taken notice of at the concluſion of the book.

[e] Att. Gen. v. Vernon. 1. Vern. 277. 370. Att. Gen. v. Crofts. 1. Brown. Parl. Ca. 222.

[f] The propriety of naming a relator for this purpoſe, and the oppreſſion ariſing from a contrary practice, were particularly noticed by baron Perrot, in a cauſe in the exchequer, Att. Gen. v. Fox. In that cauſe no relator was named; and though the defendants finally prevailed, they were put to an expence almoſt equal to the value of the property in diſpute.

[g] 2 Roll. Ab. 213.

The perſons, who are incapable *by themſelves* of inſtituting a ſuit, are, 1. infants; 2. married women; 3. idiots, and lunatics.

1. An infant is incapable by himſelf of exhibiting a bill, as well on account of his ſuppoſed want of diſcretion, as his inability to bind himſelf, and to make himſelf liable to the coſts of the ſuit. When therefore an infant claims a right, or ſuffers an injury, on account of which it is neceſſary to reſort to the extraordinary juriſdiction of the court of chancery, his neareſt relation is ſuppoſed to be the perſon who will take him under his protection, and inſtitute a ſuit to aſſert his rights, or to vindicate his wrongs. The perſon, who inſtitutes a ſuit on behalf of an infant, is therefore termed his *next friend*. But as it frequently happens, that the neareſt relation of the infant himſelf with-holds the right, or does the injury, or at leaſt neglects to give that protection to the infant which his conſanguinity or affinity calls upon him to give, the court, in favour of infants, will permit any perſon to inſtitute ſuits on their behalf [h]. Such perſon, being ſuppoſed to act the part which the neareſt relation ought to take, is alſo ſtyled the next friend of the infant, and as ſuch is named in the bill. The next friend is liable to the coſts of the ſuit [i]; and to the cenſure of the

[h] Prec. in Ch. 376. 1 Atkyns, 570. [i] Moſely, 47. 86.

court,

court, if the ſuit is wantonly or improperly inſtituted.

2. A married woman being under the protection of her huſband, a ſuit reſpecting her rights is uſually inſtituted by them jointly. But it ſometimes happens, that a married woman claims ſome right in oppoſition to rights claimed by her huſband; and then the huſband being the perſon, or one of the perſons, to be complained of, the complaint cannot be made by him. In ſuch caſe, therefore, as the wife, being under the diſability of coverture, cannot ſue alone, and yet cannot ſue under the protection of her huſband, ſhe muſt ſeek ſome other protection, and the bill muſt be exhibited in her name by her next friend [k], who is alſo named in the bill in the ſame manner as in the caſe of an infant. But a bill cannot in the caſe of a feme-covert be filed without her conſent [l], as may be done in the caſe of an infant.

3. The care and commitment of the cuſtody of the perſons and eſtates of idiots and lunatics are the prerogative of the crown, and are always granted to the perſon holding the great ſeal, by the royal ſign manual. By virtue of this authority, upon an inquiſition finding any perſon an idiot, or a lunatic, grants of the cuſtody of the perſon and eſtate of the idiot, or lunatic, are made to ſuch perſons as the lord chancellor, or lord keeper, or lords com-

[k] 2 Veſey, 452.

[l] Prec. in Ch. 376.

miſſioners

miſſioners for the cuſtody of the great ſeal for the time being, ſhall think proper [m]. Idiots and lunatics, therefore, ſue by the committees of their eſtates [n]. Sometimes, indeed, informations have been exhibited by the attorney-general, on behalf both of idiots and lunatics, conſidering them as under the peculiar protection of the crown [o].

[m] 3 P. Williams, 106, 107.
[n] Eq. Ca. Ab. 279. Prac. Reg. 232.
[o] 1 Chan. Ca. 112. 153.

CHAP. II.

Of the ſeveral kinds and diſtinctions of bills.

BILLS, with reſpect to their ſeveral kinds and diſtinctions, may be conſidered under three general heads. I. Original bills, which relate to ſome matter not before litigated in the court by the ſame perſons ſtanding in the ſame intereſts. II. Bills not original, which are either an addition to, or a continuance of, an original bill, or both. III. Bills, which, though occaſioned by, or ſeeking the benefit of, a former bill, are not a continuance thereof, and are therefore in the nature of original bills.

I. Original bills may be again divided into bills praying relief, and bills not praying relief.—An original bill praying relief may be, 1. A bill praying the decree of the court touching ſome right claimed by the perſon exhibiting the bill, in oppoſition to ſome right claimed by the perſon againſt whom the bill is exhibited. 2. A bill of interpleader, where the perſon exhibiting the bill claims no right in oppoſition to the rights claimed by the perſons againſt whom the bill is exhibited, but prays the decree of the court touching the rights of thoſe perſons, for the ſafety of the perſon exhibiting the bill. 3. A bill praying the writ of certiorari to remove a cauſe from an inferior court of equity.—

An

An original bill not praying relief may be, 1. A bill to perpetuate the teſtimony of witneſſes. 2. A bill for diſcovery of facts reſting within the knowledge of the perſon againſt whom the bill is exhibited, or of deeds, writings, or other things, in his cuſtody or power.

II. A bill not original, but an addition to, or a continuance of, an original bill, or both, may be, 1. A ſupplemental bill, which is merely an addition to the original bill. 2. A bill of revivor, which is a continuance of the original bill, when by death ſome party to it has become incapable of proſecuting or defending a ſuit, or a female plaintiff has by marriage incapacitated herſelf from ſuing alone. 3. A bill both of revivor and ſupplement, which both continues a ſuit upon an abatement, and ſupplies defects ariſen from ſome event ſubſequent to the inſtitution of the ſuit.

III. A bill in the nature of an original bill, though occaſioned by, or ſeeking the benefit of, a former bill, may be, 1. A croſs bill, exhibited by the defendant in a former bill, againſt the plaintiff in the ſame bill, touching ſome matter in litigation in the firſt bill. 2. A bill of review, to examine and reverſe a decree, made upon a former bill, and ſigned by the perſon holding the ſeals, and inrolled, whereby it has become a record of the court. 3. A bill in the nature of a bill of review, brought by a perſon not bound by the former decree. 4. A bill to impeach a decree upon the ground of fraud. 5. A bill

to

to carry a decree made in a former ſuit into execution. 6. A bill in the nature of a bill of revivor, to obtain the benefit of a ſuit after abatement, in certain caſes which do not admit of a continuance of the original bill. 7. A bill in the nature of a ſupplemental bill, to obtain the benefit of a ſuit, either after abatement in other caſes which do not admit of a continuance of the original bill; or after the ſuit is become defective, without abatement, in caſes which do not admit of a ſupplemental bill to ſupply that defect. 8. A bill filed by the direction of the court, for the purpoſe of obtaining its decree touching ſome matter not put in iſſue by a former bill, or not in iſſue between the proper parties, but which muſt neceſſarily be determined, to enable the court to make a complete decree touching the matters in litigation upon the firſt bill.

CHAP.

CHAP. III.

Of the frame and end of the feveral kinds of bills.

THE feveral kinds of bills have been already conſidered as divided into three claſſes. In the firſt claſs have been ranked original bills; in the ſecond, bills not original; in the third, bills in the nature of original bills, though occaſioned by former bills. Informations may be conſidered under a fourth head.

I. Original bills have been mentioned as again diviſible into bills praying relief, and bills not praying relief.

Original bills praying relief have been ranked under three heads.—1. Original bills praying the decree of the court touching ſome right claimed by the perſon exhibiting the bill, in oppoſition to rights claimed by the perſon againſt whom the bill is exhibited. 2. Bills of interpleader. And 3. Certiorari bills.—Bills of the firſt kind are the bills moſt uſually exhibited in the court; and as the ſeveral other kinds of bills are either conſequences of this, or very ſimilar to it in many reſpects, the conſideration of bills of this kind will in a great meaſure involve the conſideration of bills in general.

1. An original bill praying the decree of the court touching rights claimed by the perſon exhibiting the bill, in oppoſition to rights claimed by the

the perſon againſt whom the bill is exhibited, muſt ſhew the rights of the plaintiff, or perſon exhibiting the bill; by whom, and in what manner, he is injured; or in what he wants the aſſiſtance of the court; that he is without remedy, except in a court of equity; or at leaſt is properly relievable, or can be moſt effectually relieved there. Having thus ſhewn the plaintiff's title to the aſſiſtance of the court, the bill may pray, that the defendant, or perſon againſt whom the bill is exhibited, may anſwer upon oath the matters charged againſt him. It may alſo pray the relief or aſſiſtance of the court, which the plaintiff's caſe intitles him to. For theſe purpoſes the bill muſt pray, that a writ, called a writ of ſubpœna, may iſſue under the great ſeal, which is the ſeal of the court, to require the defendant's appearance, and anſwer to the bill. It is uſual to add to the prayer of the bill, a general prayer of that relief, which the circumſtances of the caſe may require; that if the plaintiff miſtakes the relief to which he is intitled, the court may yet afford him that relief to which he has a right [p]. Indeed, a prayer of general relief, without a ſpecial prayer of the particular relief to which the plaintiff thinks himſelf intitled, is ſufficient [q]; and the particular relief the caſe requires may, at the hearing, be prayed at the bar. But this relief muſt be agreeable to the caſe made by the bill, and not different from it [r].

[p] 2 Mod. 91, 92.
[q] 2 Atkyns, 3.
[r] 2 Atkyns, 141. 3 Atk. 132.

All

All perſons concerned in the demand, or who may be affected by the relief prayed, ought to be parties, if within the juriſdiction of the court [s]. But if any neceſſary parties are omitted, or unneceſſary parties are inſerted, the court, upon application, will permit the proper alterations to be made. If, however, a perſon has been made a plaintiff who is an unneceſſary party, or ought to have been a defendant, the court will not permit his name to be ſtruck out as a plaintiff, eſpecially after anſwer, unleſs upon a ſpecial application; and then, if the defendants require it, not without ſecurity for their coſts.

It is the practice to inſert in a bill a general charge, that the parties named in it combine together, and with ſeveral other perſons, unknown to the plaintiff, whoſe names, when diſcovered, the plaintiff prays he may be at liberty to inſert in the bill. This practice is ſaid to have ariſen from an idea, that without ſuch a charge parties could not be added to the bill by amendment. From whatever cauſe it has ariſen it is ſtill adhered to, except in the caſe of a peer, who was never charged with combining with others to deprive a plaintiff of his right, either out of reſpect to the peerage, or perhaps apprehenſion that ſuch a charge might be conſtrued a breach of privilege.

The rights of the ſeveral parties, the injury complained of, and every other neceſſary circumſtance,

[s] Prec. in Ch. 83. 2 Atkyns, 510.

as time, place, manner, or other incidents, ought to be plainly, yet ſuccinctly, alledged. And as the bill muſt be ſufficient in ſubſtance, ſo it muſt have convenient form [t].

Every bill muſt be ſigned by counſel; and if it contains matter criminal, impertinent, or ſcandalous, ſuch matter ſhall be expunged, and the counſel ſhall pay coſts to the party aggrieved [u]. But nothing relevant is to be conſidered as ſcandalous [x].

Two ſeveral bills cannot be filed againſt the ſame defendants for the ſame matters, nor one bill for ſeparate and diſtinct matters; nor will the court permit a plaintiff to file ſeveral bills againſt ſeveral defendants, where their intereſts are all the ſame, and can properly be determined upon one bill.

2. Where two or more perſons claim the ſame thing by different or ſeparate intereſts, and another perſon, not knowing to which of the claimants he ought of right to render a debt or duty, fears he may be hurt by ſome of them, he may exhibit a bill of interpleader againſt them [y]. In this bill he muſt ſtate his own rights, and their ſeveral claims, and pray that they may interplead, ſo that the court may adjudge to whom the thing belongs, and he may be indemnified [z]. If any ſuits at law are brought againſt him, he may alſo pray, that the

[t] Prac. Reg. 24, 25.
[u] Rules and Orders of Cha. 93. 1 Ch. Rep. 194.
[x] 2 Veſey, 24.
[y] Bunbury, 303. 1 Equ. Ca. Ab. 80.
[z] 2 Eq. Ca. Ab. 173. 1 Burr. 37. Prac. Reg. 38.

claimants may be reſtrained from proceeding till the right is determined [a]. The plaintiff, in a bill of interpleader, muſt annex to it an affidavit, that there is no colluſion between him and any of the parties; and if any money is due from him, he ought to bring it into court, or offer ſo to do by his bill [b].

3. When an equitable right is ſued for in an inferior court of equity, and, by means of the limited juriſdiction of the court, the defendant cannot have complete juſtice, or the cauſe is without the juriſdiction of the inferior court, the defendant [c] may file a bill in chancery, praying a ſpecial writ, called a writ of certiorari, to remove the cauſe into the court of chancery [d]. This ſpecies of bill, having no other object than to remove a cauſe from an inferior court of equity, merely ſtates the proceedings in the inferior court, ſhews the incompetency of that court, and prays the writ of certiorari. It does not pray, that the defendant may anſwer, or even appear, to the bill, and conſequently it prays no writ of ſubpœna. The proceedings upon the bill are peculiar, and are particularly mentioned in the books which treat of the practice of the court [e]. It may ſeem improper to conſider certiorari bills

[a] Prac. Reg. 39.
[b] Prac. Reg. 39. Bunbury, 303.
[c] 2 Chan. Rep. 109, 110.
[d] Prac. Reg. 41. Boh. Priv. Lond. 291. Car. Rep. 48. 1 Vern. 178.
[e] Prac. Reg. 41. Sol. Prac. in Chan. epit. 4.

under

under the head of bills praying relief. But as they always alledge ſome incompetency of the inferior court, or injuſtice in its proceedings [f], and ſeek relief againſt that incompetency, or injuſtice, they ſeem more properly to come into conſideration under this head, than under any other; eſpecially as in caſe the court of chancery removes the cauſe from the inferior court, the bill exhibited in that court is conſidered as an original bill in the court of chancery, and is proceeded upon as ſuch.

Original bills not praying relief have been already mentioned to be of two kinds, 1. bills to perpetuate the teſtimony of witneſſes; and 2. bills of diſcovery.

1. A bill to perpetuate the teſtimony of witneſſes muſt ſhew a title in the plaintiff [g] to the thing whereto the teſtimony relates, and pray leave to examine witneſſes thereto, to the end their teſtimony may be preſerved and perpetuated.

2. Every bill is in reality a bill of diſcovery; but the ſpecies of bill uſually diſtinguiſhed by that title, is a bill for diſcovery of facts reſting in the knowledge of the defendant, or of deeds or writings in his cuſtody or power, and ſeeking no relief in conſequence of the diſcovery. A bill of this nature muſt ſhew a right to the diſcovery prayed. To a bill ſeeking a diſcovery of deeds or writings, a prayer that they may be delivered up is ſometimes

[f] 1 Vern. 442. Smith v. Att. Gen. Mich. 1777.
[g] Rep. Temp. Finch. 391.

 added.

added. But if any relief beyond the mere delivery of the deeds or writings is prayed, the plaintiff muſt annex to his bill an affidavit, that the deeds, of which he ſeeks a diſcovery, are not in his cuſtody or power, and that he knows not where they are, unleſs they are in the hands of the defendant. A bill for a diſcovery merely, or which only prays the delivery of deeds or writings, requires no ſuch annexed affidavit [h].

II. Bills not original are either an addition to, or a continuance of, an original bill, or both. A ſuit, perfect in its inſtitution, may by ſome ſubſequent event become defective, ſo that no proceeding can be had, either as to the whole, or as to ſome part, with effect. Or it may become abated, ſo that there can be no proceeding at all, either as to the whole, or as to part of the bill. The firſt is the caſe, where, although the parties to the ſuit remain before the court, ſome ſubſequent event has either made ſuch a change in their intereſts, or given to ſome other perſon ſuch an intereſt in the matters in litigation, that the proceedings, as they ſtand, cannot have their full effect. The other is the caſe where, by ſome ſubſequent event, there is no perſon before the court, by whom, or againſt whom, the ſuit, in the whole, or in part, can be proſecuted. It is not very accurately aſcertained in the books of practice, or in the reports, in what caſes

[h] 2 P. Wms 541. 3 Atkyns, 132.

a ſuit

a ſuit becomes defective, without being abſolutely abated; and in what caſes it abates, as well as becomes defective. But upon the whole it may be collected [i], that if by any means the intereſt of a party in any matter in litigation becomes veſted in another, the proceedings are rendered defective, in proportion as that intereſt affects the ſuit; ſo that although the parties to the ſuit remain as before, yet the end of the ſuit cannot be obtained. And if ſuch a change of intereſt is occaſioned by, or is the conſequence of, the death of a party whoſe intereſt is not determined by his death, or the marriage of a female plaintiff, the proceedings become likewiſe abated, or diſcontinued, either in part or in the whole. For as far as the intereſt of a party dying extends, there is no longer any perſon before the court by whom, or againſt whom, the ſuit can be proſecuted; and a married woman is incapable by herſelf of proſecuting a ſuit. As the intereſt of a plaintiff generally extends to the whole ſuit, therefore, in general, upon the death of a plaintiff, or marriage of a female plaintiff, all proceedings become abated [k]. Upon the death of a defendant,

[i] It is impoſſible to give authorities for every thing aſſerted upon this head. The books, in words, almoſt as frequently contradict as ſupport theſe aſſertions. But it is conceived, that from an attentive peruſal of the caſes it will be found, that, in general, the grounds of the deciſions warrant the concluſions here drawn.

[k] 1 Eq. Ca. Ab. 1. margin.

likewiſe, all proceedings abate as to that defendant. But upon the marriage of a female defendant the proceedings do not abate [l], though her huſband ought to be named in the ſubſequent proceedings [m]. If the intereſt of a party dying ſo determines that it can no longer affect the ſuit, and no perſon becomes intitled thereupon to the ſame intereſt, as frequently happens in the caſe of a tenant for life, the ſuit does not abate. If the intereſt of a party dying ſurvives to another party; as if a bill is filed by, or againſt, truſtees or executors, and one dies; or by or againſt huſband and wife, in right of the wife, and the huſband dies [n]; the proceedings do not abate. So if a ſurviving party can ſuſtain the ſuit, as in the caſe of ſeveral creditors plaintiffs on behalf of themſelves and other creditors; for the perſons remaining before the court, in all theſe caſes, have in them the whole intereſt in the matter in litigation, or at leaſt are competent to call

[l] 4 Vin. Ab. 147. Pl. 20. 2 Vern. 318.

[m] The reaſon of the difference between the caſes of a female plaintiff and defendant ſeems to be, that a plaintiff ſeeking to obtain a right, the defendant may be injured by anſwering to one who is not intitled to ſue for it: but a defendant merely juſtifying a poſſeſſion, the plaintiff cannot be injured by a decree againſt the perſon holding that poſſeſſion. And it has been determined, that where a female plaintiff has married, and has, notwithſtanding, proceeded in a ſuit as a feme ſole, the *mere want* of a bill of revivor is not error for which a decree can be reverſed, upon a bill of review brought by the defendant. 1 Chan. Rep. 231. Nelſ. Rep. 86.

[n] 3 Chan. Rep. 40. 2 Vern. 249. 3 Atkyns, 726.

upon

upon the court for its decree. If, indeed, upon the death of the huſband of a female plaintiff, ſuing in her right, the widow does not proceed in the cauſe, the bill is conſidered as abated, and ſhe is not liable to the coſts [n]. But if ſhe does take any ſtep in the cauſe, the ſuit may proceed without a bill of revivor; for ſhe alone has the whole intereſt, and the huſband was a party in her right. The caſe is the ſame if a female plaintiff marries pending a ſuit, and afterwards before revivor her huſband dies; for then her incapacity to proſecute the ſuit is removed. After a decree on a bill of interpleader, there is generally an end of the ſuit as to the plaintiff; and if he dies the cauſe may proceed without revivor [o].

There is the ſame want of accuracy in the books, in aſcertaining the manner in which the benefit of a ſuit may be obtained, after it has become defective or abated by an event ſubſequent to its inſtitution, as there is in the diſtinction between the caſes where a ſuit becomes defective merely, and where it likewiſe abates. It ſeems, however, clear, that if any property or right, in litigation, veſted in a *plaintiff*, is tranſmitted to another, the perſon to whom it is tranſmitted is intitled to ſupply the defects of the ſuit, if become defective merely, and to continue it, or at leaſt to have the benefit of it, if abated. It ſeems alſo clear, that if any property or right,

[n] Treat. on Star-cham. p. 3. ſect. 3. Harl. MSS.

[o] 1 Vern. 351.

before veſted in a *defendant*, becomes tranſmitted to another, the plaintiff is intitled to render the ſuit perfect, if become defective, or to continue it, if abated, againſt the perſon to whom that property or right is tranſmitted.

The means of ſupplying the defects of a ſuit, continuing it if abated, or obtaining the benefit of it, are, 1. by ſupplemental bill; 2. by bill of revivor; 3. by bill of revivor and ſupplement; 4. by original bill in the nature of a bill of revivor; and 5. by original bill in the nature of a ſupplemental bill. The diſtinctions between the caſes in which a ſuit may be added to, or continued, or the benefit of it obtained, by theſe ſeveral means, ſeem to be the following.

1. When any event happens ſubſequent to the time of filing an original bill [p], which gives a new intereſt in the matter in diſpute to any perſon not a party to the bill, as the birth of a tenant in tail; or a new intereſt to a party, as the happening of ſome other contingency; or occaſions ſome change of intereſt, as an aſſignment of a mortgage; or, in fine, any event, which makes an alteration with reſpect to any of the claims of any party to the ſuit, and does not occaſion an abatement; the defect in the proceedings may be ſupplied by a ſupplemental bill merely [q]. And if by any event the whole in-

[p] 1 Atkyns, 291. 3 Atkyns, 217.

[q] There are caſes which ſeem to contradict this aſſertion. See Com. Rep. 589. But this apparent contradiction is perhaps rather in words than in ſubſtance.

tereſt

tereſt of a *defendant* in the matter in litigation is utterly at an end, but the ſame intereſt is become veſted in another perſon not claiming under the former party, whether the ſuit is by this event become defective merely, or abated as well as become defective, it may be rendered perfect, and continued, by ſupplemental bill, ſhewing the manner in which the property has changed from the one to the other. If the intereſt of a *plaintiff ſuing in auter droit* entirely determines by death, or otherwiſe, and ſome other perſon thereupon becomes intitled to the ſame property, under the ſame title; as in the caſe of new aſſignees under a commiſſion of bankrupt, upon the death, or removal, of former aſſignees [r]; or in the caſe of an executor, or adminiſtrator, upon the determination of an adminiſtration *durante minori ætate* [s], or, *pendente lite*, the ſuit may be likewiſe added to, and continued, by ſupplemental bill [t]. In all theſe caſes if the ſuit has become abated, as well as defective, the bill is commonly termed a ſupplemental bill in the nature of a bill of revivor, as it has the effect of a bill of revivor in continuing the ſuit.

Sometimes a ſupplemental bill becomes neceſſary, in conſequence of a defect in the original bill, or in ſome part of the proceedings, and not in conſe-

[r] 1 Atkyns, 88, 89. 3 Atkyns, 218.

[s] Prec. in Ch. 175. Car. Rep. 22.

[t] In the caſe of an adminiſtration determined by death, a bill of revivor by a ſubſequent adminiſtrator has been admitted. 2 Vern. 237. 2 Eq. Ca. Ab. 3, 4.

quence

quence of any event which has occaſioned any change of intereſt in the ſubject matter of the ſuit. This happens generally after a decree; and the bill may be in aid of the decree, that it may be carried fully into execution, or that proper directions may be given upon ſome matter omitted in the original bill [u], or not put in iſſue by it, or by the defence made to it [x]; or to bring formal parties before the court [y]. Or it may be uſed as a ground to impeach the decree, which is the peculiar caſe of a ſupplemental bill in the nature of a bill of review, of which it will be neceſſary to treat more at large in another place. A ſupplemental bill may likewiſe be brought to obtain a farther diſcovery [z] from a defendant, where the proceedings are in ſuch a ſtate that the original bill cannot be amended for that purpoſe [a].

2. Wherever a ſuit abates by death, and the intereſt of the perſon whoſe death has cauſed the abatement is tranſmitted to that repreſentative which the law gives or aſcertains, as an heir at law, executor, or adminiſtrator; ſo that the title cannot be diſputed, at leaſt in the court of chancery, but the perſon in whom the title is veſted is alone to be aſcertained; the ſuit may be continued by bill of revivor merely. If a ſuit abates by marriage of a female plaintiff, and no act is done to affect the

[u] 3 Atkyns, 133.
[x] 3 Atkyns, 110.
[y] 3 Atkyns, 217.
[z] 2 Ch. Rep. 142.
[a] 3 Atkyns, 570

rights

rights of the party but the marriage, no title can be diſputed; the perſon of the huſband is the ſole fact to be aſcertained, and therefore the ſuit may be continued in this caſe, likewiſe, by bill of revivor merely.

3. But if by any act beſides the marriage, as a ſettlement, the rights of the parties are affected, though a bill of revivor merely may continue the ſuit, ſo as to enable the parties to proſecute it, yet to bring before the court the whole matter neceſſary for its conſideration, the parties muſt, by ſupplemental bill, added to, and made part of their bill of revivor, ſhew the ſettlement, or other act, by which their rights are affected. And in the ſame manner, if any other event which occaſions an abatement, is accompanied, or followed, by any matter which becomes neceſſary to be ſtated to the court to ſhew the rights of the parties, or to obtain the full benefit of the ſuit, beyond what is merely neceſſary to ſhew by or againſt whom the cauſe is to be revived, that matter muſt be ſet forth by way of ſupplemental bill added to the bill of revivor.

4. If the death of a party whoſe intereſt is not determined by his death, is attended with ſuch a tranſmiſſion of his intereſt, that the title, as well as the perſon intitled, may be litigated in this court; as in the caſe of a deviſe of a real eſtate [b]; the ſuit is not permitted to be continued by a bill of revivor.

[b] 1 Ch. Ca. 123. 174. 3 Ch. Rep. 39. Moſely, 44.

An

An original bill, upon which the title may be litigated [c], muſt be filed; and this bill will have ſo far the effect of a bill of revivor, that if the title of the repreſentative ſubſtituted by the act of the deceaſed party is proved, or admitted by the perſons having right to conteſt it, the ſame benefit may be had of the proceedings upon the former bill, as if the ſuit had been continued by a bill of revivor [d]. Where a ſuit became abated after a decree ſigned and inrolled, it was anciently the practice to revive the decree by a ſubpœna in the nature of a *ſcire facias*; but if there had been any proceedings ſubſequent to the decree, this proceſs was ineffectual [e], and it is now become the practice, in all caſes, to revive by bill.

5. If the intereſt of a plaintiff or defendant, ſuing or defending in his own right, wholly determines, and the ſame property becomes veſted in another perſon not claiming under him; as in the caſe of an eccleſiaſtical perſon ſucceeding to a benefice, or a remainder-man in a ſettlement becoming intitled upon the death of a prior tenant under the ſame ſettlement [f]; the ſuit cannot be continued by bill of revivor, or its defects ſupplied by a ſupplemental bill. For though the ſucceſſor in the firſt caſe, and

[c] 1 Eq. Ca. Ab. 2 Marg. 2 Freem. 132.

[d] 1 Vern. 427. 2 Vern. 548. 672. 2 Brown. Parl. Ca. 529. 1 Eq. Ca. Ab. 83.

[e] 2 Ch. Rep 67. 2 Eq. Ca. Ab. 180.

[f] 2 Eq. Ca. Ab. 3. 2 Brown. Parl. Ca. 320. 454, 455.

the

the remainder-man in the ſecond, have the ſame property which the predeceſſor, or prior tenant, enjoyed; yet they are not in many caſes bound by his acts, nor have they in ſome caſes preciſely the ſame rights. But, in general, by an original bill, in the nature of a ſupplemental bill, the benefit of the former proceedings may be obtained. If the party whoſe intereſt is thus determined was not the ſole plaintiff, or defendant; or if the property, which occaſions a bill of this nature, affects only a part of the ſuit, the bill, as to the other parties, and the reſt of the ſuit, is ſupplemental merely. --- There ſeems to be this difference between an original bill in the nature of a bill of revivor, and an original bill in the nature of a ſupplemental bill. Upon the firſt, the benefit of the former proceedings is abſolutely obtained, ſo that the pleadings in the firſt cauſe, and the depoſitions of witneſſes, if any have been taken, may be uſed in the ſame manner as if filed or taken in the ſecond cauſe [f]; and if any decree has been made in the firſt cauſe, the ſame decree ſhall be made in the ſecond [g]. But in the other caſe, a new defence may be made; the pleadings and depoſitions cannot be uſed in the ſame manner as if filed or taken in the ſame cauſe; and the decree, if any has been obtained, is no otherwiſe of advantage, than as it may be an inducement to the court to make a ſimilar decree.

Having conſidered generally the diſtinctions between the ſeveral ſpecies of bills, by which a ſuit,

[f] 1 Atk. 89. [g] 2 Vern. 548. 672. 1 Eq. Ca. Ab. 83.

become

become defective, or abated, may be added to, or continued, or the benefit of it obtained; it will remain in this place to conſider more particularly the frame of the three firſt of thoſe ſpecies of bills. The other two will form part of the ſubject to be conſidered under the next head.

1. A ſupplemental bill muſt ſtate the original bill, and the proceedings thereon; and if the ſupplemental bill is occaſioned by any event ſubſequent to the original bill, it muſt ſtate that event, and the conſequent alteration with reſpect to the parties; and, in general, the ſupplemental bill muſt pray, that all the defendants may appear and anſwer to the charges it contains. For the cauſe muſt be heard upon the ſupplemental bill at the ſame time that it comes on to be heard upon the original bill, if it has not been before heard; and if the cauſe has been before heard, it muſt in general, if not always, be farther heard upon the ſupplemental matter [h]. If indeed the alteration or acquiſition of intereſt happens to a defendant, or a perſon neceſſary to be made a defendant, the ſupplemental bill may be exhibited againſt ſuch perſon alone, and may pray a decree upon the particular ſupplemental matter alledged againſt that perſon only [i]; unleſs, which is frequently the caſe, the intereſts of the other defendants may be affected by that decree. Where a ſupplemental bill is merely for the purpoſe of

[h] 3 Atkyns, 217.

[i] 3 Atkyns, 217.

bringing

bringing formal parties before the court, the parties to the original bill need not be made parties to the ſupplemental [k].

2. A bill of revivor muſt ſtate the original bill, and the ſeveral proceedings thereon, and the abatement; it muſt ſhew a title to revive [l], and charge that the cauſe ought to be revived, and ſtand in the ſame condition, with reſpect to the parties in the bill of revivor, as it was in with reſpect to the parties to the original bill at the time the abatement happened; and it muſt pray that the ſuit may be revived accordingly. It may be likewiſe neceſſary to pray, that the defendant may anſwer the bill of revivor; as in the caſe of a requiſite admiſſion of aſſets [m]. And if a defendant to an original bill dies before putting in an anſwer, the bill of revivor, though requiring in itſelf no anſwer, muſt yet pray, that the perſon againſt whom it ſeeks to revive the ſuit may anſwer the original bill.

Upon a bill to revive only, the defendants muſt anſwer in eight days after appearance, and ſubmit that the ſuit ſhall be revived, or ſhew cauſe to the contrary; and in default the ſuit may be revived without anſwer, by an order made upon motion as a matter of courſe. The ground for this is an allegation, that the time allowed the defendants to anſwer by the courſe of the court is expired, and that no anſwer is put in: it is therefore preſumed that

[k] 3 Atkyns, 217.
[l] Com. Rep. 590.
[m] Prac. Reg. 45.

the

the defendant can ſhew no cauſe againſt reviving the ſuit in the manner prayed by the bill.

After a decree a defendant may file a bill of revivor, if the plaintiffs, or thoſe in their right, neglect to do it [n]. For then the rights of the parties are aſcertained, and plaintiffs and defendants are equally intitled to the benefit of the decree, and equally have a right to proſecute it [o]. The bill of revivor in this caſe, therefore, merely ſubſtantiates the ſuit, and brings before the court the parties neceſſary to ſee to the execution of the decree, and to be the objects of its operations, rather than to litigate the claims made by the ſeveral parties in the original pleadings [p]. In the caſe of a bill by creditors on behalf of themſelves and other creditors, any creditor is intitled to revive [q]. A ſuit, become entirely abated, may be revived as to part only of the matter in litigation, or may be revived as to part by one bill, and as to other part by another. As if the rights of a plaintiff in a ſuit upon his death become veſted, part in his real, and part in his perſonal repreſentatives; the real repreſentative may revive the ſuit, ſo far as concerns his title, and the perſonal, ſo far as his demand extends [r].

3. A bill of revivor and ſupplement is merely a compound of thoſe two ſpecies of bills, and in its ſeparate parts muſt be framed and proceeded upon in the ſame manner.

[n] Prec. in Ch. 197. 1 Eq. Ca. Ab. 2.

[o] See, however, 3 Atkyns, 691.

[p] 1 Eq. Ca. Ab. 2. Finch v. Lord Winchelſea.

[q] 1 Eq. Ca. Ab. 3.

[r] 1 Eq. Ca. Ab. 3, 4.

III. Bills

III. Bills in the nature of original bills, though occaſioned by former bills, are of eight kinds. 1. Croſs bills. 2. Bills of review, to examine and reverſe decrees ſigned and inrolled. 3. Bills in the nature of bills of review, to examine and reverſe decrees, either ſigned and inrolled, or not, brought by perſons not bound by the decree. 4. Bills impeaching decrees upon the ground of fraud. 5. Bills to carry decrees into execution. 6. Bills in the nature of bills of revivor. 7. Bills in the nature of ſupplemental bills. And 8. Bills filed by the particular direction of the court.

1. A croſs bill is a bill brought by a defendant againſt a plaintiff, or other parties in a former bill depending, touching the matter in queſtion in that bill. A bill of this kind is uſually brought to obtain, either a neceſſary diſcovery, or full relief to all parties. It frequently happens, and particularly if any queſtion ariſes between two defendants to a bill, that the court cannot make a complete decree, without a croſs bill, or croſs bills, to bring every matter in diſpute completely before the court, litigated by the proper parties, and upon proper proofs. In this caſe it becomes neceſſary for ſome or one of the defendants to the original bill, to file a bill againſt the plaintiff and other defendants in that bill, or ſome of them, and bring the litigated point properly before the court. A croſs bill ſhould ſtate the original bill, and proceedings thereon, and the rights of the party exhibiting the bill, or the ground on

which he reſiſts the claims of the plaintiff in the original bill. But a croſs bill being generally conſidered as a defence [s], or as a proceeding to procure a complete determination of a matter already in litigation in the court, the plaintiff is not, at leaſt as againſt the plaintiff in the original bill, obliged to ſhew any ground of equity to ſupport the juriſdiction of the court [t].

2. The object of a bill of review is, to procure an examination and reverſal of a decree made upon a former bill, and ſigned by the perſon holding the great ſeal, and inrolled [u]. It may be brought upon error of law appearing [x] in the body of the decree itſelf [y], or upon diſcovery of new matter. In the firſt caſe the decree can only be reverſed upon the ground of the apparent error [z]; as if an abſolute decree be made againſt a perſon, who upon the face of it appears to have been an infant [a]. A bill of this nature may be brought without the leave of the court previouſly given [b]. But if it is ſought to reverſe a decree, ſigned and inrolled, upon diſcovery of ſome new matter [c], the leave of the court muſt be firſt obtained [d]. This will not be granted, but upon allegation upon oath, that

[s] 3 Atkyns, 812.
[t] Hardres, 160.
[u] Tothill, 47. Bob. Curs. Canc. 353.
[x] 1 Ch. Ca. 54.
[y] 1 Roll. Ab. 387. Prec. in Ch. 260. 3 P. Wms. 371.
[z] Tothill, 41. 1 Ch. Rep. 231. Nelſ. Rep. 86. Prac. Reg. 50. 4 Vin. Ab. 414.
[a] Prac. Reg. 196.
[b] 2 Atkyns, 534.
[c] 2 Veſey, 576. 3 P. Wms. 371. Nelſ. Rep. 52.
[d] Tothill, 42.

the

the new matter diſcovered could not poſſibly be had, or uſed, at the time when the decree was made [e]. If the court is ſatisfied that the new matter is relevant and material, and ſuch as might probably have occaſioned a different determination [f], a bill of review will be permitted to be exhibited [g]. If upon a bill of review a decree has been reverſed, another bill of review may be brought upon the decree of reverſal [h]. But when twenty years have elapſed from the time of pronouncing a decree, and the decree has been ſigned and inrolled, a bill of review cannot be brought [i]. In a bill of this nature it is neceſſary to ſtate [k] the former bill, and the proceedings thereon; the decree, and the point in which the party exhibiting the bill of review conceives himſelf aggrieved by it [l]; and the ground of law, or new matter diſcovered, upon which he ſeeks to impeach it. The bill may pray, ſimply, that the decree may be reviewed, and reverſed in the point complained of, if it has not been carried into execution. If it has been carried into execution, the bill may alſo pray the farther decree of the court, to put the party complaining of the former decree into the ſituation in which he would have been, if that decree had not been carried into exe-

[e] 2 Brown. Parl. Ca. 109. Prac. Reg. 51.
[f] 1 Veſey, 432.
[g] 1 Veſey, 430.
[h] 2 Chan. Pract. 633.
[i] 1 Brown. Parl. Ca. 95.
[k] 3 Ch. Rep 45. 2 Prax. Alm. Cur. Canc. 520. 2 Chan. Prac. 629.
[l] 4 Vin. Ab. 414. Pl. 5.

cution. If the bill is brought to review the reverſal of a former decree, it may pray that the original decree may ſtand [m]. The bill may alſo, if the original ſuit has become abated, be at the ſame time a bill of reviver [n]. A ſupplemental bill may likewiſe be added, if any event has happened which requires it [o].

To render a bill of review neceſſary, the decree ſought to be impeached muſt have been ſigned and inrolled. If, therefore, this has not been done, a decree may be examined and reverſed upon a ſpecies of ſupplemental bill, in nature of a bill of review, where any new matter has been diſcovered ſince the decree [p]. A decree not ſigned and inrolled, being liable to be altered upon a re-hearing, and not requiring a bill of review if there is ſufficient matter to reverſe it appearing upon the former proceedings, the inveſtigation of the decree muſt be brought on by a petition of re-hearing [q]; and the office of the ſupplemental bill, in nature of a bill of review, is, to ſupply the defect which occaſioned the decree upon the former bill [r]. It is neceſſary to obtain the leave of the court to bring a ſupplemental bill of this nature [s].

[m] 2 Chan. Prac 634.
[n] 2 Prax. Alm. Cur. Canc. 511.
[o] 1 Vern. 135.
[p] 2 Atkyns, 42. 3 Atkyns, 811
[q] 2 Veſey, 598.
[r] 2 Atkyns, 177.
[s] Order 17, Oct. 1741. Rules and Orders in Ch. 107. 2 Atkyns, 139. 3 Atkyns, 811. 2 Veſey, 571. 596.

3. If

3. If a decree is made againſt a perſon who had no intereſt at all in the matter in diſpute, or had not ſuch an intereſt as is ſufficient to render the decree againſt him binding upon ſome perſon claiming after him, relief may be obtained againſt error in the decree by a bill in the nature of a bill of review. Thus if a decree is made againſt a tenant for life only; a remainder-man in tail, or in fee, cannot defeat the proceedings againſt the tenant for life, but by a bill, ſhewing the error in the decree, the incompetency in the tenant for life to ſuſtain the ſuit, and the accruer of his own intereſt; and thereupon praying that the proceedings in the original cauſe may be reviewed, and for that purpoſe that the other party may appear to, and anſwer, this new bill, and that the rights of the parties may be properly aſcertained. A bill of this nature, as it does not ſeek to alter a decree made againſt the plaintiff himſelf, or againſt any perſon under whom he claims, may be filed without the leave of the court.

4. If a decree has been obtained by fraud, it may be impeached by original bill [t] without the leave of the court [u]. There do not appear in the books many inſtances of ſuch a bill, in caſes of direct fraud in obtaining a decree; but it ſeems to have been conſidered, that where a decree has been made

[t] 2 P. Williams, 73. 3 P. Wms. 111. 1 Brown. Parl. Ca. 414.

[u] 3 Atkyns, 811. Rep. Temp. Talbot, 201.

againſt a truſtee, the ceſtui que truſt not being before the court, and the truſt not diſcovered; or againſt a perſon who has made ſome conveyance, or incumbrance, not diſcovered; or where a decree has been made in favour of, or againſt, an heir, when the anceſtor has in fact diſpoſed by will of the ſubject matter of the ſuit; the concealment of the truſt, or ſubſequent conveyance, or incumbrance, or will, in theſe ſeveral caſes, ought to be treated as a fraud [x].

5. Sometimes from the neglect of parties, or ſome other cauſe, it becomes impoſſible to carry a decree into execution, without the farther decree of the court [y]. This happens, generally, in caſes where the parties having neglected to proceed upon the decree, their rights become ſo embarraſſed by a variety of ſubſequent events, that it is neceſſary to have the decree of the court to ſettle and aſcertain them. Sometimes ſuch a bill is exhibited by a perſon who was not a party, nor claims under any party, to the original decree; but claims in a ſimilar intereſt, or is unable to obtain the determination of his own rights till the decree is carried into execution. Or it may be brought by, or againſt, a perſon claiming as aſſignee of a party to the decree [z]. A bill for this purpoſe is, generally, partly an original bill, and partly a bill in the nature of an

[x] 1 Ch. Ca. 151, 152. 3 Ch. Rep. 95. Vern. 409.
[y] 2 Ch. Rep. 128. [z] 1 Ch. Ca. 231.

original

original bill, though not ſtrictly original. Sometimes it is likewiſe a bill of revivor, or a ſupplemental bill, or both.

6. It has been already mentioned [a], that when the intereſt of a party dying is tranſmitted to another, in ſuch a manner that the tranſmiſſion may be litigated in this court; as in the caſe of a deviſee; the ſuit cannot be revived by, or againſt, the perſon to whom the intereſt is ſo tranſmitted. But that ſuch perſon, if he ſucceeds to the intereſt of a plaintiff, is intitled to the benefit of the former ſuit; and if he ſucceeds to the intereſt of a defendant, the plaintiff is intitled to the benefit of a former ſuit againſt him; and that this benefit is to be obtained by an original bill in nature of a bill of revivor. A bill for this purpoſe muſt ſtate the original bill, the proceedings upon it, the abatement, and the manner in which the intereſt of the party dead has been tranſmitted; and it muſt charge the validity of the tranſmiſſion, and ſtate the rights which have accrued by it. A bill of this nature is ſaid to be original, merely for want of that privity of title between the party to the former, and the party to the latter bill, though claiming the ſame intereſt, as would have permitted the continuance of the ſuit by bill of revivor. Therefore the party to the new bill ſhall be equally bound by, or have advantage of, the proceedings on the original bill, as if there had been ſuch a privity be-

[a] P. 27.

tween him, and the party to the original bill claiming the ſame intereſt [b].

7. It has been alſo mentioned [c], that if the intereſt of a plaintiff, or defendant, ſuing or defending in his own right, wholly determines, and the ſame property becomes veſted in another perſon, not claiming under him; the ſuit cannot be continued by a bill of revivor, or its effects ſupplied by a ſupplemental bill. But that by an original bill in the nature of a ſupplemental bill, the benefit of the former proceedings may be obtained. A bill for this purpoſe muſt ſtate the original bill, the proceedings upon it, the event which has determined the intereſt of the party by or againſt whom the former bill was exhibited, and the manner in which the property has veſted in the perſon become intitled. It muſt then ſhew the ground upon which the court ought to grant the benefit of the former ſuit to or againſt the perſon ſo become intitled; and pray the decree of the court adapted to the caſe of the plaintiff in the new bill [d]. This bill, though partaking of the nature of a ſupplemental bill, is not an addition to the original bill, but another original bill, which in its conſequences may draw to itſelf the advantage of the proceedings on the former bill.

8. Upon hearing a cauſe it ſometimes appears,

[b] 2 Vern. 548. 672. Prec. in Ch. 134. 2 Brown. Parl. Ca. 529.

[c] P. 28.

[d] 2 Brown. Parl. Ca. 320.

that

that the ſuit already inſtituted is inſufficient to bring before the court all matters neceſſary to enable it fully to decide upon the rights of all the parties. This frequently happens where perſons in oppoſite intereſts are co-defendants, ſo that the court cannot determine their oppoſite intereſts upon the bill already filed, and the determination of their intereſts is yet neceſſary to a complete decree upon the ſubject matter of the ſuit. In ſuch a caſe, if upon hearing the cauſe the difficulty appears, and a croſs bill has not been exhibited to remove the difficulty, the court will direct a bill to be filed, in order to bring all the rights of all the parties fully, and properly, for its deciſion; and will reſerve the directions, or declarations, which it may be neceſſary to give, or make, touching the matter not fully in litigation by the former bill, until this new bill is brought to a hearing [e].

IV. Informations in every reſpect follow the nature of bills, except in their ſtyle. When they concern the rights of the crown, or of thoſe for whom it is a truſtee, they are exhibited in the name of the king's attorney, or ſollicitor-general, as the informant. But where a relator is named, and the rights of the crown are not immediately concerned, the relator in reality ſuſtains and directs the ſuit; and ſometimes having an intereſt in the matter in diſpute, is at the ſame time relator, and plaintiff. In this caſe the pleading is ſtyled an information and

[e] 3 Atkyns 110.

bill.

bill. An information concerning the rights of the queen, is exhibited alſo in the name of her attorney-general. The proceedings upon an information can only abate by the death or determination of intereſt of the defendant. And if there are ſeveral relators, the death of any of them, while there ſurvives one, will not affect the ſuit. But if all the relators die, or if there is but one, and that relator dies, the court will not permit any farther proceeding till an order has been obtained for liberty to inſert the name of a new relator, and ſuch name is inſerted accordingly, Otherwiſe there would be no perſon liable to pay the coſts [e] of the ſuit, in caſe the information ſhould be deemed improper, or for ſome other reaſon ſhould be diſmiſſed.

Many of the matters requiſite to the ſufficiency of the ſeveral ſpecies of bills, muſt neceſſarily be conſidered at the ſame time, with the advantages which may be taken of their inſufficiencies, and will be conſequently part of the ſubject of the following book.

[e] 1 Veſey, 72. 2 Veſey, 327.

BOOK

BOOK THE SECOND.

OF THE DEFENCE TO BILLS, AND OF REPLICATIONS.

CHAPTER I.

Of the Defence to Bills.

EVERY bill, except a bill praying the writ of certoriari to remove a cauſe from an inferior court of equity, requires an anſwer upon oath to the ſeveral charges it contains. The defence to the bill muſt therefore be made in that manner, unleſs the defendant will diſclaim all right to the matters in queſtion by the bill, or ſuch part thereof to which he makes no other defence; or unleſs he can ſhew ſome ground upon which he can diſpute the right of the plaintiff to compel an anſwer to the charges in the bill, or to ſome of them. This may be done, either by ſhewing the inſufficiency of the facts alledged in the bill to compel an anſwer, or that for ſome reaſon apparent on the bill, or ſome conſequence of law to be drawn from matter apparent on the bill, the defendant ought not to be compelled to anſwer; or by ſhewing ſome matter of fact not apparent on the bill, by reaſon of which the defendant ought not to be compelled to anſwer. The firſt

of

of theſe exceptions to a bill, ariſing from matter apparent on the face of it, is termed a demurrer; the ſecond exception, ariſing from ſome fact ſhewn by the defendant, is termed a plea. If no exception can be ſhewn, or if the exceptions go to part of the bill only, the defendant muſt upon oath anſwer the bill, or ſuch part of it to which he can ſhew no exception to avoid the neceſſity of an anſwer.

It has been repeatedly obſerved that the moſt uſual bills are ſuch as ſeek the decree of the court touching ſome right claimed by the perſon exhibiting the bill, in oppoſition to the rights claimed by the perſon againſt whom the bill is exhibited; and bills of this nature always ſeek from the defendant a diſcovery of the facts charged. This diſcovery the defendant muſt make by way of anſwer, unleſs he can avail himſelf of ſome exception to the bill. An anſwer muſt confeſs and avoid, or traverſe and deny, the material points in the bill[f]; that is, ſuch matters as are neceſſary to ſubſtantiate the proceedings, and make them regular and effectual in a court of equity; and all facts material to the plaintiff's caſe, and to enable him to obtain a decree. This is required, as well to ſupply proof which cannot otherwiſe be procured, as in aid of proof which may be procured, and to avoid expence[g]. In ſome particulars the ſeveral other kinds of bills do not require ſo extenſive a defence, and almoſt each diſ-

[f] 2 Weſt. Symb. Chan. 104. [g] 2 Vezey 492. Plaſt. Reg. 6.

tinct

tinct ſpecies of bills requires ſome defence particular to itſelf. There are likewiſe perſons incapable *by themſelves* of defending a ſuit. In treating therefore of the defence which may be made to a bill it will be proper to conſider, I. What perſons are capable, and what perſons are incapable, *by themſelves* of defending a ſuit. II. The nature of the various modes of defence; under which head will be conſidered, 1. demurrers, 2. pleas, 3. anſwers and diſclaimers, or any two or more of them, jointly, each referring to a ſeparate and diſtinct part of the bill.

CHAP. II.

Of the Perſons capable, and incapable, by themſelves of defending a Suit.

ALL perſons capable *by themſelves* of inſtituting a ſuit, are likewiſe capable *by themſelves* of defending one. If the intereſt of the crown, or of thoſe for whom it is a truſtee, is concerned; the king's attorney-general, or, during the vacancy of that office, the ſollicitor-general, becomes a neceſſary party to defend that intereſt. The queen's attorney, or ſollicitor-general, ſeems to be the party neceſſary to ſupport her rights [h]. Infants, idiots, and lunatics, who are incapable by themſelves of inſtituting a ſuit, are likewiſe incapable by themſelves

[h] See 2 Roll. Ab. 213.

of

of defending one. But married women, who cannot by themſelves inſtitute a ſuit, may defend by themſelves, ſeparately from their huſbands, with the leave of the court.

Infants inſtitute a ſuit by their next friend; but to defend a ſuit the court appoints them guardians, who are uſually their neareſt relations, not concerned in point of intereſt in the matter in queſtion. If a perſon is by age, or infirmities, reduced to a ſecond infancy, he may alſo defend by guardian[j]. Idiots, and lunatics, defend by their committees. If a married woman claims in oppoſition to any claim of her huſband, or if ſhe lives ſeparate from him[k], or diſapproves the defence he wiſhes her to make[l], ſhe may obtain an order for liberty to defend the ſuit ſeperately from her huſband.

CHAP. III.

Of the Nature of the various Modes of Defence to a Bill, and firſt of Demurrers.

THE perſon againſt whom the bill is exhibited, being called upon to anſwer the complaint made againſt him, may defend himſelf, 1. By demurrer, by which he demands the judgement of the court whether he ſhall be compelled to anſwer

[j] Prec. in Chanc. 329. Tothill, 75.
[k] Prec. in Ch. 329. [l] 2 Atkyns 50.

the

the bill or not [m]. 2. By plea, whereby he ſhews ſome cauſe why the ſuit ſhould be diſmiſſed, delayed, or barred [n]. 3. By anſwer, which confeſſes and avoids, or traverſes and denies, the ſeveral parts of the bill [o]. 4. By diſclaimer, which at once terminates the ſuit, the defendant diſclaiming all right in the matter ſought by the bill [p]. 5. By demurrer, plea, anſwer, and diſclaimer, or by any two or more of them, each of which muſt relate to ſeperate and diſtinct parts of the bill.

A defendant may take advantage of many defects in a bill, if they are evident upon the face of it, by way of demurrer. Many, therefore of the requiſites to the ſufficiency of the different kinds of bills will neceſſarily be conſidered at the ſame time with the various cauſes of demurrer.

A demurrer is an allegation of a defendant, which, admitting the matters of fact [q], or ſome of them, alledged by the bill, to be true, ſhews, as they are therein ſet forth, they are inſufficient for the plaintiff to proceed upon, or to oblige the defendant to anſwer [r]; or that for ſome reaſon apparent on the face of the bill, or becauſe of ſome omiſſion therein, or of the want of ſome circumſtance which ought to be attendant thereon, the defendant ought

[m] Prac. Reg. 131.
[n] Prac. Reg. 273.
[o] 2 Weſt. Symb. Chan. 194. Prac. Reg. 6.
[p] Prac. Reg. 141.
[q] A demurrer confeſſes matter of fact only, and not matter of law. Ld. Raym. 18.
[r] Prac. Reg. 131.

not

not to be compelled to anſwer. It therefore demands the judgement of the court whether the defendant ſhall be compelled to make anſwer to the plaintiff's bill, or to ſome certain part thereof[s]. The cauſes of demurrer are merely upon matter in the bill[t], or upon the omiſſion of matter which by the rules of the court ought to be therein, or attendant thereon; and not upon any foreign matter alledged by the defendant. The principal ends of a demurrer are, to avoid a diſcovery which may be prejudicial to a defendant, to cover a defective title, or to prevent unneceſſary expence. If no one of theſe ends is obtained, there is little uſe in a demurrer. For, in general, if a demurrer would hold to a bill, though the defendant anſwers, the court will not grant relief upon hearing the cauſe. There are, however, caſes in which the court will grant relief upon hearing, though a demurrer to the relief would have been allowed[u]. Theſe are principally, where the defendant having ſubmitted to anſwer, and the cauſe having proceeded regularly to a hearing, no expence would be avoided by diſmiſſing the bill. But the caſes are rare.

The moſt uſual bills, as has been already obſerved, are ſuch as ſeek the decree of the court touching ſome right claimed by the plaintiff, in oppoſition to ſome right claimed by the defendant. The defence

[s] 3 P. Wms. 80. Prac. Reg. 132.

[t] Prac Reg. 132.

[u] 3 P. Wms. 150.

to

to a bill of this nature is conſequently, likewiſe, moſt uſual, and is alſo in general the moſt extenſive. In treating, therefore, of demurrers with reference to this ſpecies of bills, the nature of demurrers in general muſt neceſſarily be conſidered. Mere bills of diſcovery differ little from the firſt ſpecies of bills, except that they pray no relief; for every bill, except a certiorari bill, is in fact a bill of diſcovery. The nature of demurrers in general, and the principal cauſes of demurrer, may therefore be conſidered with reference only to the firſt ſpecies of bills, and to bills for diſcovery merely. The peculiar diſtinct cauſes of demurrer, incident to the ſeveral other kinds of bills, may be afterwards taken notice of.

Demurrers to the firſt ſpecies of bills are ſometimes both to the diſcovery ſought and to the relief prayed by the bill, or to part of the diſcovery and relief; ſometimes to the relief only, or part of the relief; and ſometimes to the diſcovery only, or part of the diſcovery. Sometimes alſo a demurrer is an advantage taken of ſome ſlip, inaccuracy, or miſtake, in the bill. The ſeveral cauſes of demurerr to the firſt ſpecies of bills may therefore be conſidered under the following heads. 1. Demurrers to the relief prayed by a bill, which frequently include a demurrer to the diſcovery ſought. 2. Demurrers to the diſcovery only, or part of the diſcovery, which ſometimes conſequentially affect the relief. 3. Demurrers upon ſome ſlip, inaccuracy, or miſtake, in a bill. Under ſome of theſe heads many of the

cauſes of demurrer to bills of diſcovery merely will neceſſarily be treated of; and under a fourth head may be conſidered the peculiar cauſes of demurrer to that ſpecies of bills.

I. The cauſes of demurrer to the relief ſought by a bill, which will generally include a demurrer to the diſcovery, are principally theſe[y]. 1. That the plaintiff is incapable *alone* of inſtituting a ſuit. 2. The want of proper parties to the ſuit. 3. The want of privity between the plaintiff and defendant. 4. The want of proper title in the plaintiff to the thing demanded. 5. That the plaintiff ſhews an unlawful claim. 6. The want of equity in the plaintiff's caſe, apparent on the bill. 7. That the plaintiff hath full remedy at law. 8. That the plaintiff hath full remedy in the eccleſiaſtical court. 9. That the relief prayed by the bill is againſt a proceeding at law upon a criminal proſecution, or upon a mandatory writ. 10. That the plaintiff ought to have eſtabliſhed his right at law before he filed his bill. 11. That the plaintiff demands things of ſeveral natures againſt ſeveral defendants by the ſame bill. 12. That the bill is brought for part of a matter only. 13. That the plaintiff ſhews no claim of intereſt in the defendant in the thing demanded by the bill. 14. That the bill

[y] It is ſaid a defendant may demur to a bill, if it appears upon the face of it to be brought for a very ſmall ſum; but it is moſt uſual to apply to the court that the bill may be diſmiſſed. Moſely 47. 356. Bunbury 17.

ſhews

ſhews no ground to charge the defendant with the plaintiff's demand.

1. If an infant, or a married woman, an idiot, or a lunatic, exhibiting a bill, appear upon the face of it to be thus incapable of inſtituting a ſuit *alone*, and no next friend or committee is named in the bill, the defendant may demur. But if the incapacity does not appear upon the face of the bill, the defendant cannot take advantage of it by way of demurrer. This advantage may be taken as well in the caſe of a bill for a diſcovery merely, as in the caſe of a bill for relief. For the defendant in a bill for a diſcovery merely, being always intitled to coſts after a full anſwer as a matter of courſe, would be materially injured, by being compelled to anſwer a bill exhibited by perſons, whoſe property is not in their own diſpoſal, and who are therefore incapable of paying the coſts.

2. All perſons materially intereſted in the matter in diſpute ought to be parties to the ſuit, plaintiffs, or defendants, however numerous they may be, ſo that a complete decree may be made between thoſe parties. In ſome caſes [a], as in the inſtance of creditors, ſeeking an account of a real and perſonal eſtate for payment of their demands, a few, ſuing on behalf of the reſt, may ſubſtantiate the ſuit [b]; and the other creditors may come in under

[a] Prec. in Ch. 592. Gilb. 230. [b] 2 Vezey 312. 313.

the decree. But if a huſband ſues alone, for a legacy given to his wife [c]; if one joint-tenant ſues without the other [d]; if a bill be brought againſt the heir only, where the perſonal eſtate is firſt liable to anſwer the plaintiff's demand [e]; and in many other caſes [f]; the want of proper parties is a good cauſe of demurrer. In ſome caſes, however, where all the perſons intereſted are not made parties, yet if there is ſuch a privity between the plaintiffs and defendants, that a complete decree may be made, the want of parties ſhall not be a cauſe of demurrer. As if a bill is brought by a lord of a manor againſt ſome of the tenants, or by ſome of the tenants againſt the lord, upon a queſtion of common; or by a parſon for tithes againſt ſome of the pariſhioners; or by ſome of the pariſhioners againſt the parſon, to eſtabliſh a general modus [g]. And if a ſufficient reaſon for not bringing a neceſſary party before the court is ſuggeſted by the bill; as if the party is reſident out of the juriſdiction of the court, and that fact is charged [h]; or if a perſonal repreſentative is a neceſſary party, and the repreſentation is charged

[c] 1 Ch. Ca. 41. Nelſ. Rep. 78.

[d] Rep. Temp. Finch, 82.

[e] 3 P. Wms. 331. 2 Atkyns, 51.

[f] Rep. Temp. Finch, 4. 113. 202. 3 P. Wms. 311. note (I.) 1 Atkyns, 290. Nelſ. Rep. 93. 1 Eq. Ca. Ab. 72. 2 Eq. Ca. Ab. 165.

[g] 1 Atkyns, 283. Contr. 2 Eq. Ca. Ab. 170.

[h] Prec. in Ch. 83. 2 Atkyns, 510.

to

to be in litigation in the eccleſiaſtical court [h]; a demurrer will not hold. So, too, if the bill ſeeks a diſcovery of the parties intereſted in the matter in queſtion, a demurrer, for want of the neceſſary parties, will not hold [i].

A demurrer for want of parties muſt ſhew, who are the proper parties: not indeed by name, for that might be impoſſible; but in ſuch manner, as to point out to the plaintiff the objection to his bill, and enable him to amend, by adding the proper parties. In the caſe of a demurrer for want of parties, the court has permitted the plaintiff to amend, when the demurrer has been held good upon argument [k].

3. A demurrer may be to a bill, for want of privity between the plaintiff and defendant. But a principal has a right to a diſcovery of his agent's tranſactions; and therefore if a factor is employed to ſell the goods of a merchant, the merchant may file a bill againſt the perſons to whom the goods have been ſold, for an account, and to be paid the money for which the goods have been ſold, if it is not already paid to the factor; and a demurrer to ſuch a bill has been over-ruled [l].

4. A demurrer may alſo be for want of proper title in the plaintiff to the thing demanded [m]: as where perſons, who had obtained letters of adminiſtration in a foreign court, fought an account of

[h] 2 Atkyns, 51.
[i] 1 Vern. 95.
[k] 2 Ch. Ca. 197.
[l] 2 Atkyns, 394.
[m] 1 Vern. 39.

perſonal eſtate [n]; or where a proteſtant next of kin claimed a rent-charge, ſettled on a papiſt upon her marriage [o]. In the firſt caſe the plaintiffs did not ſhew a complete title; for though they might have a right to adminiſtration in the proper eccleſiaſtical court in England, they did not ſhew that they had obtained it. In the ſecond caſe the plaintiff had evidently no right; for the papiſt was then incapable of taking by purchaſe, and therefore the grant of the rent-charge was utterly void. So if a plaintiff claims under a will, and it is apparent upon the conſtruction of the will that he has no title, the defendant may demur [p]. But if upon arguing the demurrer the court is not ſatisfied, and is deſirous the matter ſhould come more fully to be debated at a deliberate hearing, the demurrer may be over-ruled, without prejudice to the defendant's inſiſting on the ſame matter by way of anſwer [q].

If the bill does not ſhew in the plaintiff a title in the thing demanded, he has as little right to a diſcovery, as to relief. Thus if a bill is brought to diſcover a will, and the plaintiff does not intitle himſelf as deviſee, or heir, or otherwiſe [r]; or if a bill is brought for diſcovery of a perſonal eſtate, and the plaintiff does not intitle himſelf as executor, or adminiſtrator, or otherwiſe [s]; a demurrer will hold. The

[n] 3 P. Wms. 371.
[o] 2 Atkyns, 210.
[p] 2 Vezey, 247. Prec. in Ch. 589.
[q] 2 Vezey, 247.
[r] Rep. Temp. Finch, 36.
[s] Rep. Temp Finch, 44.

caſe

caſe is the ſame if a bill is brought by a perſon having title, but not a perfect title; as by an executor, who does not appear by the bill to have proved the will of his teſtator[t], or who appears to have proved it in an improper[u] or inſufficient[x] court. But if the plaintiff ſhews a complete title, though a litigated one, or one that may be litigated; as that of an adminiſtrator, where a ſuit is depending to revoke the adminiſtration[y]; or of an adminiſtrator where there may be another perſonal repreſentative[z]; he has the ſame right to a diſcovery, as if his title to the thing in demand was not litigated, or doubtful. For in the firſt caſe, till the litigation is determined his title is good; and in the ſecond caſe, the court will not conſider the eccleſiaſtical court as having done wrong. It has been determined too, that where no will has been proved, nor adminiſtration granted, but the matter is pending in the eccleſiaſtical court, a demurrer of one of the parties poſſeſſed of the perſonal eſtate, to a bill for an account filed by the other party, ſhall be over-ruled: for the eccleſiaſtical court has no means of ſecuring the effects while the ſuit there is depending[a]. But if a plaintiff has merely a probability of future title, upon an event which

t 1 P. Wms. 752.
u 3 P. Wms. 371.
x 1 P. Wms. 766.
y 1 Vern. 106.
z 3 P. Wms. 370.
a 1 Atkyns, 286. And ſee 2 Brown Parl. Ca. 476.

may never happen, a demurrer for want of title will hold [c].

5. If the claim of the plaintiff is of a matter in itſelf unlawful; as of money promiſed to a counſellor at law for advice and pains in carrying on a ſuit [d]; or of money bequeathed by a will to purchaſe a dukedom [e]; the defendant may demur to the bill. This is equally a ground of demurrer to a bill for a diſcovery merely, as to a bill for relief.

6. A want of equity in the plaintiff's caſe apparent on the bill is a ſufficient ground for a demurrer [f]. Upon the ſame ground, if a bill is brought for diſcovery of deeds, or writings, ſuggeſting that they are in the cuſtody or power of the defendant, or loſt, and any other relief is prayed than the delivery of the deeds, or writings, a demurrer will hold; except the plaintiff annexes to his bill an affidavit that the deeds or writings are not in his cuſtody or power, and that he knows not where they are, unleſs they are in the hands of the defendant. For ſuch a bill does, by conſequence, ſeek to transfer the juriſdiction from the common law to the court of equity [g]. But if the bill is brought only for diſcovery, and delivery of the deeds, ſuch an affidavit is not neceſſary [h]. Or if a bill is brought for diſco-

[c] 1 Vern. 105. 1 Eq. Ca. Ab. 234. Smith v. Attorney General, Michaelmas 1777.
[d] Rep. Temp. Finch, 75.
[e] 1 Vern. 5.
[f] 1 Vern. 210. 211. 2 Vezey, 571.
[g] 2 P. Wms. 541.
[h] 1 Vern. 180. 2 P. Wms. 541. Nelſ. Rep. 78.

very

very of a cancelled deed, and to have another deed executed; for if the plaintiff has the cancelled deed in his hands, he can make no uſe of it at law [i].

7. A demurrer to the relief prayed by a bill, for that the plaintiff hath remedy at law, will only hold where the plaintiff can have as effectual and complete remedy at law, as in equity. Upon this ground a demurrer to a bill for recovery of an ancient ſilver altar, claimed by the plaintiff as treaſure-trove within his manor, was over-ruled. For though the plaintiff might recover at law the value in an action of trover, or the thing itſelf, if it could be found, in an action of detinue; yet as the defendant might deface it, and thereby depreciate the value, it was held that the defect of the law in that particular ought to be ſupplied in equity [k]. And although the plaintiff may have remedy at law, yet if it is charged by the bill that any evidence of the plaintiff's demand is in the defendant's cuſtody, or is loſt, the defendant muſt anſwer. To ſuch bill, however, if it ſeeks relief, the plaintiff muſt annex an affidavit that he has not the evidence of the demand in his own cuſtody, or power, or the want of the affidavit will be a ſufficient cauſe of demurrer. And if there is no charge in the bill that the evidence of the demand is not in the plaintiff's cuſtody, or power, the demurrer ought to alledge that there is no ſuch charge in the bill [l]. But wherever the remedy at

[i] Moſely, 192. [k] 3 P. Wms. 390. [l] 3 P. Wms. 395.

law

law is clear, and certain [m], the court will always allow a demurrer. A defendant, having demurred to a bill for that the plaintiff had full remedy at law, will not be debarred of relief in equity upon another bill, if the plaintiff in the firſt bill ſhould proceed at law, and recover [n].

8. If a bill is brought for diſcovery, and relief, in a matter properly cognizable in the eccleſiaſtical court, a demurrer will be allowed to the relief; and likewiſe to the diſcovery, if the eccleſiaſtical court is capable of obtaining the diſcovery [o]. As in caſe a bill is brought to be relieved againſt a church rate, and to compel a diſcovery of the value of the reſpective real and perſonal eſtates of the inhabitants of the pariſhes in which the rate was aſſeſſed, and of the application of the money collected [p].

9. If a bill is brought for relief againſt a proceeding at law upon a criminal proſecution, or a mandatory writ; as an indictment, an information, a writ of prohibition, a mandamus, or any writ that is mandatory, and not remedial; the defendant may demur. For the court has no juriſdiction [q], and this being apparent on the face of the bill, the defendant may take advantage of it by demurrer. And though a bill of diſcovery lies in aid of proceedings in ſome ſuits relating to a civil right in a court of

[m] 3 Atkyns, 740. See 3 Brown. Parl. ca. 525. 205. 451.
[n] 3 P. Wms. 397.
[o] 1 Atkyns, 288. 2 Vezey,
[p] 1 Atkyns, 288.
[q] 2 Vezey, 398.

com-

common law, as an action; yet such a bill will not lie to aid the prosecution of an indictment, or information, or to aid the defence of either[r].

10. Where one general legal right is claimed against several distinct persons, a bill may be brought to establish that right[s]. But in most cases the plaintiff ought first to establish his right at law[t]. If the right has not the sanction of a long possession, and the plaintiff has any means of trying the matter at law, a demurrer, for that the plaintiff ought to have established the right at law before he brought his bill, will hold[u]. But if the plaintiff has not been actually interrupted, or dispossessed, he may bring a bill to examine his witnesses *in perpetuam rei memoriam*, and to establish his right, though he has not recovered in affirmance of it at law; and in such a case a demurrer has been over-ruled[x]. However, as bills of this nature are merely received to prevent multiplicity of suits, by determining the rights upon issues directed by the court, instead of putting the plaintiff to sue a number of persons separately at law, where each suit would only determine the peculiar right in question between the plaintiff and defendant, there is no pretence for such a bill where a right is disputed between two persons only, until the right has been tried at law[y].

r 2 Vezey, 398.
s 2 Atkyns, 484.
t 1 Atkyns, 284.
u 2 Atkyns, 391.
x 1 Atkyns, 284. Prec in Ch. 531.
y 2 Atkyns, 484. Prec. in Ch. 261.

11. The

11. The court will not permit a plaintiff to demand, by one bill, ſeveral matters of different natures againſt ſeveral defendants; for this would tend to load each defendant with an unneceſſary burthen of coſts, by ſwelling the pleadings with the ſtate of the ſeveral claims of the other defendants, with which he has no connection. A demurrer, therefore, for that the plaintiff demands ſeveral matters, of different natures, of ſeveral defendants, by the ſame bill, will hold [z]. But as the defendants may combine together to defraud the plaintiff of his rights, and ſuch a combination is always charged by a bill, the defendant muſt ſo far anſwer the bill as to deny combination [a]. In this, however, the defendant muſt be cautious; for if the anſwer goes farther than merely to deny combination, it will over-rule the demurrer [b]. A demurrer of this kind will only hold where the plaintiff claims ſeveral matters of different natures; for when one general right is claimed by the bill, though the defendants have ſeparate and diſtinct rights, yet the demurrer will not hold. As if a perſon, claiming a general right to the ſole fiſhery of a river, files a bill againſt ſeveral perſons claiming ſeveral rights in the fiſhery, as lords of manors, occupiers of lands, or otherwiſe [c]. For

[z] 1 Vern. 416. 463 Hardr. 537.
[a] 1 Vern. 416.
[b] 1 Vern. 463.
[c] 1 Atkyns, 282.

in

in this caſe the plaintiff does not claim ſeveral ſeparate and diſtinct rights, in oppoſition to ſeveral ſeparate and diſtinct rights claimed by the defendants; but he claims one general and entire right, though ſet in oppoſition to a variety of diſtinct rights claimed by the ſeveral defendants.

12. As the court will not permit the plaintiff to demand by one bill ſeveral matters, of different natures, againſt ſeveral defendants, ſo it will not permit a bill to be brought for part of a matter only; but to prevent the ſplitting of cauſes, and conſequent multiplicity of ſuits, will allow a demurrer upon this ground [d].

13. The plaintiff muſt by his bill ſhew ſome claim of intereſt in the defendant in the thing demanded by the bill, or the defendant may demur [e]. As if a bill is filed to have the benefit of, or to impeach, an award, and the arbitrators are made parties; a demurrer of the arbitrators will hold to the whole bill, as well the relief, as the diſcovery [f]. For the plaintiff can have no decree againſt them, nor can he read their anſwer againſt the other defendants. So if a bankrupt is made party to a bill againſt his aſſignees touching his eſtate, he may demur to the relief; for all his intereſt is transferred to his aſſignees; but if any diſcovery is ſought of his acts before he became a bankrupt, he muſt anſwer to that part of the bill. The plaintiff muſt likewiſe

[d] 1 Vern. 29. [e] 2 Eq. Ca. Ab. 78. [f] 2 Vern. 380.

ſhew

ſhew ſome claim of intereſt in the defendant in a bill for a diſcovery merely [g]; for ſuch a bill can only be a bill to gain evidence, and yet the anſwer of the defendant cannot be read as evidence againſt any other perſon, not even againſt another defendant to the ſame bill [h]. There ſeems, however, to be an exception to this rule in the caſe of a corporation. For as a corporation can anſwer no otherwiſe than under their common ſeal, and therefore, though they anſwer falſely, there is no remedy againſt them for perjury; it has been uſual, where a diſcovery of entries, or orders in the books of the corporation, or of any acts done by the corporation, has been neceſſary, to make their ſecretary, or book-keeper, or other officer, a party; and a demurrer, for that the bill ſhewed no claim of intereſt in the defendant, has been in ſuch caſe over-ruled [i]. So where bills have been filed to impeach deeds on the ground of fraud, attornies who have prepared the deeds, and other perſons concerned in obtaining them, have been frequently made defendants, as parties to the fraud complained of, for the purpoſe of obtaining a full diſcovery; and no caſe appears in the books of a demurrer by ſuch a party, becauſe he had no claim of intereſt in the matter in queſtion by the bill. Indeed an attorney under ſuch circumſtances has been ordered to pay coſts [k].

[g] 2 Vern. 380. 2 Atkyns, 394. 1 Vezey, 426.
[h] 2 Vern. 380. 3 P. Wms. 311. note H.
[i] 3 P. Wms. 312.
[k] 2 Atkyns, 234.

14. If

14. If a bill does not ſhew ſome ground to charge the defendant with the plaintiff's demand, the defendant may demur. As where a bill was brought, upon ſome ground of equity, by the obligee in a bond againſt the heir of the obligor, alledging that he having aſſets by deſcent ought to ſatisfy the bond; becauſe the bill did not expreſsly alledge that the heir was bound in the bond, although it alledged that the heir ought to pay the debt, a demurrer to diſcovery of aſſets was allowed [k]. So where a bill was brought againſt an aſſignee, to diſcover a matter touching a breach of a covenant in a leaſe, and the covenant appeared to be collateral, and not running with the land did not bind aſſigns; or if it did bind aſſigns, was not ſtated by the bill ſo to do; the aſſignee demurred, and the demurrer was allowed [l].

But wherever the plaintiff, though not intitled to relief in a court of equity, may yet be intitled to relief in ſome other court, which cannot compel a diſcovery upon oath; there, though the defendant may demur to the relief prayed by a bill, he muſt yet anſwer to the diſcovery ſought [m].

II. A demurrer to the diſcovery ſought by a bill, ſometimes includes, by conſequence, a demurrer to the relief, if any is prayed; for without the diſcovery the plaintiff may not be able to ſhew his

[k] 1 Vern. 180.
[l] 2 Vezey, 56.
[m] 3 P. Wms. 150. 2 Atkyns, 157.

title

title to relief. The grounds for a demurrer to a diſcovery only, are principally, 1. That the diſcovery will make the defendant liable to pains and penalties. 2. That the diſcovery will make the defendant liable to forfeiture of intereſt, or to ſomething in the nature of a forfeiture. 3. That the diſcovery cannot be material to the relief. 4. That the plaintiff ſhews no title to the diſcovery.

1. It is a general rule, that no one is bound to anſwer ſo as to ſubject himſelf to puniſhment, in whatever manner that puniſhment ariſes, or whatever is the nature of the puniſhment [n]. If therefore a bill requires an anſwer, which may ſubject the defendant to any pains, or penalties, he may demur to ſo much of the bill. As if a bill charges any thing, which, if confeſſed by the anſwer, would ſubject the defendant to any criminal proſecution [o], or to any particular penalties; as an uſurious contract [p], maintenance [q], champerty. And in ſuch caſes, if the defendant is not obliged to anſwer the facts, he need not anſwer the circumſtances, though they have not ſuch an immediate tendency to criminate [r]. But if the plaintiff is alone intitled to the penalties, and expreſsly waves them by his bill, the

n 2 Vezey, 245.
o 1 Vezey, 246. 2 Vezey, 451.
p Tothill, 135. 1 Atkyns, 450. 2 Atkyns, 393.
q Rep. Temp. Finch, 75. 3 P. Wms. 376.
r 1 Vezey, 247, 248.

&c.

defendant ſhall be compelled to make the diſcovery; for it can no longer ſubject him to a penalty. As if a rector, or impropriator, or vicar, files a bill for tythes; he may waive the penalty of the treble value [s], to which he is intitled by the ſtatute of 2 and 3 Edw. VI. and thus become intitled to a diſcovery of the tythes ſubtracted.

It is not, however, in every caſe, that the party ſhall protect himſelf againſt relief in a court of equity, upon an allegation that if he anſwers the bill filed againſt him, he muſt ſubject himſelf to the conſequences of a ſuppoſed crime. But though ſuch an allegation will not create a defence againſt relief, the court will not force the party by his own oath to ſubject himſelf to puniſhment. And therefore in the caſe of a bill to enquire into the validity of deeds, upon a ſuggeſtion of forgery, the court has entertained juriſdiction of the cauſe; and though it has not obliged the party to a diſcovery, yet has directed an iſſue to try whether the deeds were forged [t].

It ſhould ſeem, that a demurrer will alſo hold to any diſcovery, which may tend to ſhew the defendant guilty of any moral turpitude; as the birth of a child out of wedlock [u]. But a mother may in ſome caſes be compelled to diſcover where her child was born, though it may tend to ſhew the child to be

[s] 1 Vern. 60.
[t] 2 Veſey, 246.
[u] See, however, 2 Veſey, 451.

an alien [x]; for that is not a diſcovery of any illegal act, or of any act which can affect the character of the defendant.

2. A demurrer will likewiſe hold to a bill requiring a diſcovery, which may ſubject the defendant to any forfeiture [y] of intereſt; as if a bill is brought to diſcover, whether a leaſe has been aſſigned without licence; or whether a defendant, intitled during widowhood [a], or liable to forfeiture of a legacy in caſe of marriage without conſent [b], is married. But if the plaintiff is alone intitled to the benefit of the forfeiture, and expreſsly waives [c] it by the bill; as in the caſe of a bill for diſcovery of waſte [d]; a demurrer will not hold: for the court has a ground of equity to award an injunction, if the plaintiff ſues for the forfeiture [e]. And where a deviſe over of an eſtate, in caſe of marriage, is to be conſidered as a conditional limitation, and not in the nature of a forfeiture, there a demurrer to a bill for a diſcovery of marriage will not hold [f].

A defendant may in the ſame manner demur to a diſcovery, which may ſubject him to any thing in the nature of a forfeiture [g]; as where a diſcovery is ſought, whether the defendant was educated in the popiſh religion, for he incurs the incapacities in the

[x] 2 Veſey, 287. 494.
[y] Tothill, 69.
[z] 1 Veſey, 56.
[a] 2 Chan. Rep. 68.
[b] 2 Atkyns, 392. 2 Veſey, 265.
[c] 1 Veſey, 56.
[d] 2 Atkyns, 393.
[e] 1 Veſey, 56.
[f] 2 Atkyns, 393. 3 Atkyns, 260. 2 Veſey, 265.
[g] 3 Atkyns, 457.

ſtatute

ſtatute 11 and 12 Will. III [h]; or whether a clergyman was preſented to a ſecond living, which avoided the firſt [i]. So a jointreſs may demur to a bill filed by an heir at law againſt her for a diſcovery of her jointure deed, if the plaintiff is not capable of confirming, or the bill does not offer to confirm, the jointure, and the facts appear ſufficiently on the face of the bill. But, in general, advantage is taken of this defence by way of plea [k].

3. A defendant is not compellable to diſcover any thing immaterial [l] to the relief prayed by the bill. Upon this ground, upon a bill filed by a mortgagor againſt a mortgagee to redeem, and ſeeking a diſcovery whether the mortgagee was a truſtee, a demurrer to the diſcovery was allowed. For as there was no truſt declared upon the mortgage, and the defendant was willing to re-convey, free from incumbrances, it was not material to the plaintiff, whether there was any truſt repoſed in the defendant or not [m]. So where a bill was filed by a lord of a borough, praying, amongſt other things, a diſcovery, whether a perſon applying to be admitted tenant was a truſtee, the defendant demurred [n]. And where a bill was brought for a real eſtate, and fought a diſcovery of proceedings in the eccleſiaſti-

[h] Comyn, 661. 3 Bac. Ab. 800, 801. The 18 Geo. III. c. 60. does not entirely remove theſe incapacities.
[i] 3 Atkyns, 453.
[k] 2 Veſey, 450.
[l] Moſely, 38.
[m] Rep. Temp. Finch. 214.
[n] 2 Veſey, 396. 399.

çal court upon a grant of adminiſtration, the defendant demurred to that diſcovery, the proceedings in the eccleſiaſtical court being immaterial to the plaintiff's caſe [o]. Again, where a bill, to eſtabliſh an agreement for a ſeparate maintenance for the defendant's wife, prayed a diſcovery of ill-treatment of the wife to make her recede from the agreement; the defendant demurred to this diſcovery, as of a matter not properly cognizable or relievable in a court of equity [p].

4. If a bill ſeeks a diſcovery to which the plaintiff ſhews no title, a defendant may demur to the particular diſcovery, though not to the reſt of the bill. As in the caſe of a bill filed by a perſon claiming to be lord of a manor, againſt another perſon alſo claiming to be lord of the ſame manor, and praying, amongſt other things, a diſcovery in what manner the defendant derived title to the manor; the defendant demurred, becauſe the plaintiff had ſhewn no title to the diſcovery, and the demurrer was allowed [q].

III. The effect of a demurrer put in upon a ſlip, inaccuracy, or miſtake, in a bill, may be immediately deſtroyed by amending the bill in the particulars objected to, with leave of the court. Demurrers of this ſort are principally where ſome matter of neceſſary form has been omitted, as the abode of the plaintiff; or of the next friend of an infant, or

[o] 2 Atkyns, 388.
[p] 1 Vern. 204.
[q] Adderley v. Sparrow, Hilary 1779.

a mar-

a married woman, plaintiff; or of the relator in an information. The mention of the reſidence of theſe perſons is neceſſary, that the defendant may know where to reſort to ſerve proceſs, and for his coſts, if finally diſmiſſed.

If the plaintiff can avoid any demurrer whatſoever by amendment of his bill, he may obtain leave to amend it at any time before the demurrer has been argued [r]; but after argument of a demurrer to the whole of a bill, it is not uſual to permit an amendment, except in the caſe of a demurrer for want of parties [s].

IV. A bill, for a diſcovery merely, is generally liable to the ſame grounds of demurrer as any other bill. But a demurrer to a bill for a diſcovery merely will not hold for want of parties [t], for the plaintiff ſeeks no decree; nor, in general, for want of equity in the plaintiff's caſe, for the ſame reaſon; nor becauſe the plaintiff may have remedy at law, for he cannot have the diſcovery which leads to the remedy; nor becauſe the plaintiff may have remedy in the eccleſiaſtical court, in caſes where he cannot have all the neceſſary diſcovery in that court; nor becauſe a bill is brought for diſcovery of part of a matter, for that is merely a demurrer becauſe the diſcovery would be inſufficient. But it ſhould ſeem a demurrer would hold to a bill for diſcovery of ſeveral diſtinct matters, againſt ſeveral diſtinct defendants. For though a defendant is always eventu-

[r] Moſely, 301.
[s] 2 Chan. Ca. 197.
[t] 2 Eq. Ca. Ab. 170.

ally paid his coſts upon a bill of diſcovery, if both parties live, yet the court ought not to permit him to be put to any unneceſſary expence, as either the plaintiff or defendant may die pending the ſuit.

Although as the ſpecies of bills already conſidered are the moſt uſual, demurrers to ſuch bills are alſo moſt uſual, yet demurrers will likewiſe hold to any other ſpecies of bills, except a certiorari bill, and generally for the ſame cauſes. But ſome of the different kinds of bills have likewiſe their own peculiar diſtinct cauſes of demurrer.

Thus if to a bill of interpleader the uſual affidavit, that the plaintiff does not collude with any of the parties, is not annexed, the defendant may demur [u]. To ſuch a bill there is likewiſe another cauſe of demurrer; for if the plaintiff does not ſhew, that each of the defendants whom he ſeeks to compel to interplead claims a right, both the defendants may demur; one, becauſe the plaintiff ſhews no right in the defendant demurring; the other, becauſe the plaintiff, ſhewing no right in the co-defendant, ſhews no cauſe of interpleader [x]. Or if the plaintiff ſhews no right to compel the defendants to interplead, whatever rights they may claim, each defendant may demur.

To a certiorari bill, as has been already obſerved, there can be no demurrer; for it requires no anſwer [y].

[u] 1 Veſey, 248.

[x] 1 Veſey, 248.

[y] There are in the books many caſes apparently to the contrary; but they ſeem not to have been caſes of bills praying merely the writ of certiorari. See 1 Chan. Ca. 31.

There

There are few cafes in which a man is not intitled to perpetuate the teftimony of witneffes [z], and therefore to fuch a bill a demurrer will feldom lie. But if upon the face of the bill the plaintiff appears to have no certain right to, or intereft in, the matter to which he craves leave to examine, in prefent, or in future [a], a demurrer will hold. As if a perfon not claiming under a will fhould pray leave to perpetuate the teftimony of the witneffes to the will; or a perfon claiming as a devifee in the will of a perfon living, but a lunatic, fhould bring a bill to perpetuate the teftimony of witneffes to the will, againft the prefumptive heir at law [b]; or a perfon who would be next of kin to a lunatic if he were dead inteftate, fhould bring a bill, in the life-time of the lunatic, to perpetuate the teftimony of witneffes to his legitimacy, againft the attorney-general as fupporting the rights of the crown [c]. The parties have, in thefe cafes, no intereft in any thing which can be the fubject of a fuit; they fuftain no character under which they can afterwards ufe the depofitions [d]; and therefore the depofitions, if taken, would be wholly nugatory. But even where a de-

[z] 1 Atkyns, 451. 571. 1 P. Wms. 117. Prec. in Ch. 531. 1 Rol. Ab. 383.

[a] Smith v. Att. Gen. in Chan. Mich. 1777.

[b] 1 Vern. 105. 1 Eq. Ca. Ab. 234. Smith v. Watfon, in Chan. 20 June, 1760, before lord Northington. 2 Prax. Alm. Cur. Canc. 500. where there is the form of fuch a demurrer.

[c] Smith v. Att. Gen. Mich. 1777.

[d] See 2 Prax. Alm. Cur. Canc. 501.

fendant might demur both to the diſcovery ſought and the relief prayed by a bill, it was held, that to ſo much of the bill as ſought to perpetuate the teſtimony of witneſſes the defendant could not demur [f].

If a bill of revivor does not ſhew a ſufficient ground for reviving the ſuit [g], or any part of it [h], either by, or againſt [i], the perſon by, or againſt, whom it is brought, the defendant may by demurrer ſhew cauſe againſt the revival [k]. Indeed though the defendant does not demur, yet if the plaintiff does not ſhew a title to revive, he will take nothing by his ſuit at the hearing [l]. A demurrer will hold to a bill of revivor brought ſingly for coſts [m]; the court not permitting a ſuit to be revived for that purpoſe only, even where the coſts have been actually taxed before the abatement happened. If a ſupplemental bill is brought upon a matter ariſing before the filing of the original bill, where the ſuit is in that ſtage of proceeding that the bill may be amended, the defendant may demur [n]. If a ſupplemental bill is brought upon a matter ariſing ſubſequent to the time of the filing the original bill, againſt a perſon who was no party to the original bill, and claims no intereſt ariſing out of the matters in litigation in the original bill, the defendant to the ſupplemental bill may alſo demur; eſpecially if the ſupplemental

[f] 1 Atkyns, 450.
[g] 3 P. Wms. 348.
[h] 1 Eq. Ca. Ab. 3, 4.
[i] 2 Ch. Rep. 244.
[k] 3 P. Wms. 348.
[l] 3 P. Wms. 348.
[m] 2 Eq. Ca. Ab. 3.
[n] 3 Atkyns, 817,

bill

bill prays, that he may anſwer the matters charged in the original bill. Theſe, however, are grounds of demurrer ariſing rather from the plaintiff's having miſtaken his remedy, than from his being without remedy. Original bills, in the nature of bills of revivor, and ſupplement, are liable to objections of the ſame nature.

A croſs bill having nothing in its nature different from the firſt ſpecies of bills, with reſpect to which demurrers in general have been conſidered, except that it is occaſioned by a former bill, there ſeems no cauſe of demurrer to ſuch a bill, which will not equally hold to the firſt ſpecies of bills. And a demurrer for want of equity will not hold to a croſs bill filed by a defendant in a ſuit, againſt the plaintiff in the ſame ſuit, touching the ſame matter. For being drawn into the court by the plaintiff in the original bill, he may avail himſelf of the aſſiſtance of the court, without being put to ſhew a ground of equity to ſupport its juriſdiction [o], a croſs bill being generally conſidered as a defence [p].

The conſtant defence to a bill of review for error apparent upon a decree is, by plea of the decree, and demurrer againſt opening the inrolment [q]. But where any matter beyond the decree is to be offered againſt opening the inrolment, as length of time, that matter muſt be pleaded; otherwiſe the plaintiff will not have the benefit of exceptions, as in-

[o] Hardres, 160. [p] 3 Atkyns, 812. [q] 1 Vern. 392. 2 Atkyns, 534.

fancy,

fancy, coverture, or the like [r]. A bill of review upon the diſcovery of new matter being exhibited only by leave of the court, the ground of the bill is generally well conſidered before it is brought; and therefore in point of ſubſtance it can rarely be liable to a demurrer. But if brought upon new matter alleged, and the defendant thinks that matter not relevant, probably he might take the advantage of it by way of demurrer, although the relevancy ought to be conſidered at the time leave is given to bring the bill. If a ſupplemental bill in nature of a bill of review, is brought upon allegation of a diſcovery of new matter, and it appears upon the face of the bill that no new matter has been diſcovered, the defendant may take advantage of it by demurrer [s]. Bills in the nature of bills of review do not appear ſubject to any peculiar cauſe of demurrer, unleſs the decree ſought to be reverſed does not affect the intereſt of the perſon filing the bill. If upon argument of a demurrer to a bill of review, the demurrer is allowed, and the order allowing it is inrolled, it is an effectual bar to another bill of review [t]. If upon the face of a bill to carry a decree into execution, the plaintiff appears to have no right to the benefit of the decree, the defendant may demur.

A bill filed by the direction of the court, for the purpoſe of obtaining its decree touching ſome mat-

[r] 2 Vefey, 109. See, however, 1 Brown. Parl. Ca. 95.

[s] 2 Atkyns, 40.

[t] 2 Ch. Ca. 133. 1 Vern. 135. 4 7. 441. 2 Vern. 120.

ter

ter not in iſſue by the former bill, or not in iſſue between the proper parties, does not ſeem liable to any peculiar cauſe of demurrer. Indeed, being exhibited by order of the court upon hearing another cauſe, there is little probability, that ſuch a bill ſhould be liable, in ſubſtance, to any demurrer.

In addition to the ſeveral particular cauſes of demurrer applicable to particular kinds of bills, it may be obſerved, that any irregularity in the frame of a bill of any ſort may be taken advantage of by demurrer. Thus if a bill is brought contrary to the uſual courſe of the court, a demurrer will hold [u]. As where after a decree directing incumbrances to be paid according to priority, the plaintiff, a creditor, obtained an aſſignment of an old mortgage, and filed a bill to have the advantage it would give him by way of priority over the demands of ſome of the defendants [x]. This was a bill to vary a decree, and yet was neither a bill of review, nor a ſupplemental bill in nature of a bill of review, which are the only kinds of bills which can be brought to affect or alter a decree [y], unleſs the decree has been obtained by fraud [z]. So if a ſupplemental bill is brought againſt a perſon not a party to the original bill, praying that he may anſwer the original bill, and

[u] 3 Atkyns, 809. Bunbu- 56.

[x] 3 Atkyns, 811. 2 Veſey, 571.

[y] 1 Ch. Ca. 44. 2 Freem. 179.

[z] 3 Atkyns, 811. Rep. Temp Talb. 201.

no

no reaſon is ſuggeſted why he could not be made a party to the original bill by amendment, he may demur [a]. If an irregularity ariſes in any alteration of a bill by way of amendment, it may alſo be taken advantage of by demurrer. As if a plaintiff amends his bill, and ſtates a matter ariſen ſubſequent to the filing of the bill [b], which conſequently ought to be the ſubject of a ſupplemental bill, or bill of revivor.

Having thus conſidered the ſeveral grounds of demurrer, it may be proper to obſerve ſome particulars, which are neceſſary to be attended to in framing demurrers in general.

A demurrer muſt be ſigned by counſel; but is put in without oath, as it aſſerts no fact, but relies merely upon matter apparent upon the face of the bill. It is therefore conſidered, that the defendant may, by advice of counſel, upon the ſight of the bill only, be enabled to demur thereto [c]. For this reaſon it is always made the ſpecial condition of an order for time to demur plead or anſwer to the plaintiff's bill, that the defendant ſhall not demur alone. Whenever, therefore, the defendant has obtained an order for time, and is afterwards adviſed to demur, he muſt plead to or anſwer ſome part of the bill. It has been held, that anſwering to ſome fact immaterial to the cauſe, and denying combination, do not amount to a compliance with the terms of ſuch an order; and therefore, upon

[a] 3 Atkyns, 817.
[b] 1 Atkyns, 291.
[c] Ord. in Ch. 96.

motion,

motion, a demurrer accompanied by ſuch an anſwer has been diſcharged [d]. But great inconvenience might ariſe from this determination, if ſtrictly adhered to. For it often happens that a defendant cannot poſſibly anſwer any material part of the bill, without over-ruling his demurrer; it being held, that if a defendant anſwers to any part of a bill to which he has demurred, he waives the benefit of the demurrer [e]; or if he pleads to any part of a bill before demurred to, the plea will overrule the demurrer [f]. For the plaintiff may reply to a plea, or anſwer, and thereupon examine witneſſes, and hear the cauſe; but the proper concluſion of a demurrer is, to demand the judgment of the court, whether the defendant ought to anſwer to ſo much of the bill as the demurrer extends to, or not [g]. The condition, that the defendant ſhall not demur alone, ſeems now, therefore, conſidered more liberally; and anſwering any one fact in a bill, and denying combination, is generally eſteemed a compliance with the order. It has been even ſaid, that the court will not incline to diſcharge the demurrer if the defendant denies combination only, where he cannot anſwer farther without over-ruling his demurrer [h]. Indeed any material anſwer muſt in many caſes over-rule the demurrer; ſo that giving a defendant leave to demur, not demurring alone, is often in effect giving leave to do a thing, but

[d] 2 P. Wms 286.
[e] 3 P. Wms. 79. 2 Atkyns, 157.
[f] 2 Atkyns, 282.
[g] 3 P. Wms. 80.
[h] 3 Atkyns, 726, 727.

clogging

clogging the permiſſion with a condition which makes it nugatory. And though the rule was firſt adopted upon a reaſonable ground, to prevent unneceſſary delay, it may, if ſtrictly obſerved, contradict the maxim, that a court of equity ought not for form ſake to do a great injuſtice [i].

Every demurrer muſt expreſs the ſeveral cauſes of demurrer [k]; and likewiſe, in caſe the demurrer goes not to the whole bill, it muſt clearly expreſs the particular parts of the bill demurred to [l]. If a demurrer is general to the whole bill, and there is any part, either as to the relief, or the diſcovery, to which the defendant ought to put in an anſwer, the demurrer, being entire, muſt be over-ruled [m]. But a defendant may put in ſeparate demurrers to ſeparate and diſtinct parts of a bill, for ſeparate and diſtinct cauſes. For the ſame ground of demurrer frequently will not apply to different parts of a bill, though the whole is liable to demurrer. And in this caſe, one demurrer may be over-ruled upon argument, and another allowed [n].

A demurrer being always upon matter apparent upon the face of the bill, and not upon any matter alleged by the defendant, it ſometimes happens that a bill which, if all the parts of the caſe were diſcloſed would be open to a demurrer, is ſo artfully drawn as to avoid ſhewing upon the face of it

[i] 1 Veſey, 247.
[k] Ord. in Ch. 97. Car. Rep. 113.
[l] 2 Veſey, 451.
[m] 1 Veſey, 248.
[n] 3 P. Wms. 143.

any

any cauſe of demurrer. In this caſe the defendant is compelled to refort to a plea, by which he may allege matter which, if it appeared on the face of the bill, would be good cauſe of demurrer. For, in moſt caſes, what is a good defence by way of plea, is alſo good as a demurrer, if the facts appear ſufficiently by the bill [o].

CHAP. IV.

Of Pleas.

A PLEA is a ſpecial anſwer to a bill, ſhewing, or relying upon, one or more things, as a cauſe why the ſuit ſhould be either diſmiſſed, delayed, or barred [p]. The defence proper for a plea muſt be ſuch as reduces the cauſe, or ſome part of it, to a ſingle point, and from thence creates a bar to the ſuit. The end of a plea is to ſave to the parties the expence of an examination of witneſſes at large; and therefore it is not every good defence in equity that is good as a plea. For where the defence conſiſts of a variety of circumſtances there is no uſe of a plea; as the examination muſt ſtill be at large, and the effect of

[o] See Hetley, 139. Bill v. Sir Atwell Lake. But ſee 3 Atkyns, 226.

[p] Prac. Reg. 273.

allowing

allowing a plea will be, that the court will give judgment on the circumſtances of the caſe before they are made out by proof [q].

Pleas are of three ſorts; I. To the juriſdiction of the court. II. To the perſon of the plaintiff, or defendant. III. In bar of the plaintiff's ſuit.—Pleas to the juriſdiction of the court, and to the perſon of the plaintiff, generally go to the whole bill, and affect both the diſcovery ſought, and the relief, if any, prayed by the bill. Theſe may therefore be conſidered, without any reference to the peculiar kinds of bills to which they may be applied. But pleas in bar of the ſuit, though they frequently go to the whole bill, and affect both the relief and diſcovery, yet ſometimes only affect part of both, and ſometimes only one, and ſometimes the other only, or part only of one, or of the other. It will be therefore neceſſary to conſider pleas of this nature with a reference to the peculiar kinds of bills to which they relate.

I. If the court of chancery has not juriſdiction in the ſubject matter of the ſuit, the defendant may plead the matter which deprives the court of juriſdiction, and ſhew to what court the juriſdiction belongs [r], and upon this ground may demand the judgment of the court, whether he ſhall be compelled to anſwer the bill [s]. Pleas of this nature ariſe principally where the ſuit is for land within

[q] 1 Atkyns, 54. 1 Har. Chan. Prac. 356 S. C.
[r] 1 Veſey, 203.
[s] Chan Prac. 417. 420.

a county

a county palatine [t], or where the defendant claims the privileges of an univerſity [u], or other particular juriſdiction.

The court of chancery being a ſuperior court of general juriſdiction, nothing ſhall be intended to be out of its juriſdiction, which is not ſhewn to be ſo [x]. It is requiſite, therefore, in a plea to the juriſdiction of the court, to allege that the court has not juriſdiction of the ſubject matter of the ſuit, and to ſhew by what means it is deprived of juriſdiction. It is likewiſe neceſſary to ſhew what court has juriſdiction [y]. If the plea does not properly ſet forth theſe particulars [z], it is bad in point of form [a]. In point of ſubſtance it is neceſſary, to intitle the particular juriſdiction to excluſive cognizance of the ſuit, that it ſhould be able to give complete remedy [b]. A plea, therefore, of privilege of the univerſity of Oxford, to a bill for a ſpecific performance of an agreement touching lands in Middleſex, has been over-ruled; for the univerſity court could not give complete relief [c].

[t] Com. Dig. Chan. 56. Chan. Prac. 420. 1 Chan. Ca. 41. Reported, upon view of precedents, that the juriſdiction of the counties palatine was allowed, between parties dwelling within the ſame, and for lands there, and matters local. Nelſ. Rep. 37. 66.

[u] Car. Rep. 65, 66. 73. 2 Ventr. 362.

[x] 1 Veſey, 204.

[y] 1 Vern. 59. 1 Veſey, 203, 204.

[z] See Nelſ. Rep. 51.

[a] 1 Veſey, 204. 2 Ventr. 362.

[b] 2 Ventris, 363. 1 Vern. 212.

[c] 2 Ventris, 363.

And if a ſuit is inſtituted againſt different perſons, ſome of whom have privilege, and ſome not, a plea will not hold [d]. It is the ſame caſe, where one defendant is not amenable to the particular juriſdiction [e]. If, likewiſe, there is a particular juriſdiction, and yet the parties to litigate any queſtion are both reſident within the juriſdiction of the court of chancery; as upon a bill concerning a mortgage of the iſland of Sarke, both mortgagor and mortgagee reſiding in England; the court of chancery will hold juriſdiction of the cauſe: for a court of equity *agit in perſonam* [f]. So where the court may not have juriſdiction to give relief, it may yet entertain a bill for a diſcovery, in aid of the court which can give relief, if the ſame diſcovery cannot be there obtained; as if the juriſdiction be in the king in council, where the defendant cannot be compelled to anſwer upon oath [g].

Similar to a plea to the juriſdiction is the caſe of a plea to an information charging an undue election of a fellow of a college in one of the univerſities, that by the ſtatutes the viſitor of the college ought to determine all controverſies concerning elections of fellows, and that ſuch controverſies ought not to be determined elſewhere [h]. But the extent of the viſitor's authority muſt be averred;

[d] Car. Rep. 55, 56. 22 Vin. Ab. 9.
[e] Hutton, 59.
[f] 1 Veſey, 204. 4 Inſt. 213.
[g] 1 Veſey, 205.
[h] 3 Atkyns, 662. 1 Veſey, 7[illegible]. 464.

and

and it muſt alſo be averred that he is able to do complete juſtice [i]. And where there is a truſt created, the viſitor having no power to compel performance of the truſt, relief muſt be had in the king's courts of general juriſdiction [k].

II. In reſpect of the perſon of the plaintiff it may be ſhewn, either that the plaintiff is by law diſabled to ſue, as being outlawed, or excommunicated, or a popiſh recuſant convict, which work a temporary diſability; or that the plaintiff is attainted in a præmunire, or of treaſon, or felony; or that he is an alien; or that he is incapable *alone* of inſtituting a ſuit. It may alſo be pleaded that the plaintiff, or defendant, is not ſuch perſon as alleged in the bill; as feme ſole, heir, executor, or adminiſtrator; and is not therefore to ſue or be ſued as ſuch for the matter in queſtion [l]. The three firſt of theſe pleas are generally to the perſon of the plaintiff ſuing in his own right; the three next may be to the perſon of the plaintiff ſuing in any right; and the laſt to the perſon either of the plaintiff, or defendant, in whatever right ſuing, or ſued.

1. If outlawry is pleaded, the record, or the capias thereupon, muſt be pleaded *ſub pede ſigilli*, and is uſually annexed to the plea [m]. A plea of outlawry, in a ſuit for the ſame duty or thing for which relief is ſought by the bill, is inſufficient, according

[i] 1 Veſey, 474.
[k] 1 Veſey, 475.
[l] Prac. Reg. 276.
[m] Tothill, 54. Prac. Reg. 276.

to the rule of law, and ſhall be diſallowed of courſe, as put in for delay. Otherwiſe a plea of outlawry is always a good plea, ſo long as the outlawry remains in force [n]. But a plea of this nature is no longer a bar than whilſt the outlawry remains in force. If that is reverſed, the plaintiff, upon payment of coſts, may ſue out freſh proceſs againſt the defendant, and compel him to anſwer the bill [o]. Outlawry in a plaintiff, executor, or adminiſtrator, cannot be pleaded; for he ſues *in auter droit* [p]. It is equally inſufficient, if alleged in diſability of a perſon named in a bill as the next friend of an infant plaintiff [q], or in an information as a relator [r].

2. The defendant may plead that the plaintiff is excommunicated, which muſt be certified by the ordinary, either by letters patent containing a poſitive affirmation that the plaintiff ſtands excommunicated, and for what; or by letters teſtimonial, reciting, "*quod ſcrutatis regiſteriis invenitur*, &c." Either of theſe certificates muſt be *ſub ſigillo*, and ſo pleaded [s]. Excommunication is a good plea to an executor, or adminiſtrator, though they ſue in *auter droit* [t]; but not to the next friend of an in-

[n] Ord. in Ch. 97. Ed. 1739.

[o] Ord. in Ch. 97.

[p] 1 Vern. 184. Prac. Reg. 277.

[q] Prac. Reg 278.

[r] There is a caſe in Prec. in Ch. 13 where a plea of outlawry, in diſability of the perſon of a relator, is ſaid to have been allowed in the duchy court of Lancaſter. But the relator ſeems to have ſuſtained the character of plaintiff, as well as of relator.

[s] Prac. Reg. 278. Fothil, 54.

[t] Co. Litt. 134. 4 Bac. Ab. 36.

fant

fant [u]. This, like the plea of outlawry, ceaſes to be a bar when the diſability is removed; and therefore the plaintiff, purchaſing letters of abſolution, may, as at law, ſue out freſh proceſs, and compel the defendant to anſwer the bill.

3. By ſtatute 3 Ja. I. c. 5. ſ. 11. every popiſh recuſant convict is in many caſes diſabled to ſue, in the ſame manner as a perſon excommunicated. The inſtances of a plea of conviction of recuſancy have probably been rare, as no traces of any occur in the books of reports, nor does the form of the plea appear in the books of practice. If advantage was attempted to be taken of this ſtatute, the court would probably require the ſame averments to ſupport the plea as are neceſſary to a plea of the ſame nature at law [x]. This plea alſo ceaſes to be a bar, if the plaintiff, by conforming, removes the diſability.

4. A plea, that the plaintiff is diſabled from ſuing, being attainted, is equally rare. It would probably be likewiſe judged with the ſame ſtrictneſs as if it was a plea at law [y].

5. There is little more to be found in the books upon the ſubject of a plea that the plaintiff is an alien [z]. An alien, who is not an alien enemy, is under no diſability of ſuing for any perſonal demand [a]; and an alien enemy may ſue under ſome

[u] Prac. Reg. 278.
[x] 3 Bac. Ab. 780, 781.
[y] 2 Atkyns, 399. Atkyns, 399. 2 Vin. Ab. 274. Alien (I.) Prac. Reg. 278.
[z] 1 Atkyns, 51.

circumſtances [b]. A plea has been put in to a bill filed by an alien infidel, not of the chriſtian faith, and was attempted to be ſupported upon the ground, that the plaintiff was upon a croſs bill incapable of being examined upon oath. The plea was overruled without argument [c].

6. If a bill is filed in the name of any perſon incapable *alone* of inſtituting a ſuit; as an infant, a married woman, or an idiot or lunatic ſo found by inquiſition; the defendant may plead the infancy, the coverture [d], or the inquiſition of idiotcy or lunacy, in bar of the ſuit.

7. A plea, that the plaintiff is not ſuch perſon as alleged in the bill, though a negative plea, is good in abatement of the ſuit; as where a plaintiff intitles himſelf as adminiſtrator, and the defendant pleads that he is not adminiſtrator [e]. So where a perſon intitling himſelf as adminiſtrator of an inteſtate files a bill, and the defendant pleads that the ſuppoſed inteſtate is ſtill living. A plea, that the defendant is not ſuch perſon as alleged in the bill, is alſo mentioned in the books of practice as a plea which may be ſupported [f]. It ſeems to have been conſidered as more convenient for a perſon, ſued in a character which he does not ſuſtain, to put in an anſwer, alleging the miſtake in the bill, and praying the judgment of the court, whether he ſhould be

[b] 3 Burr. 1741. 1 Bac. Ab. 84. Alien (D.)
[c] 1 Atkyns, 51.
[d] Prac. Reg. 276.
[e] 1 Vern. 473.
[f] Prac. Reg. 276.

com-

compelled farther to anſwer the bill [g]. But this in fact amounts to a plea.

III. A plea in bar is commonly where ſome foreign matter is alleged, whereby, ſuppoſing the bill, ſo far as it is not contradicted by the plea [h], to be true, yet the ſuit, or ſome part thereof, is barred [i]. Where there are matters alleged in the bill to which the bar does not reach, or there is ſome circumſtance relating to the matter in bar, and charged in the bill, which requires a particular anſwer, as ſuggeſtions of fraud, the defendant muſt, to ſuch points, anſwer upon oath [k]. The anſwer, in this caſe, muſt be full to the charges in the bill, and ſufficient to ſupport the plea [l]. For the matters ſo charged will be intended againſt the pleader, unleſs they are fully denied by the anſwer.

Pleas in bar will be firſt conſidered with reference only to the firſt ſpecies of bills, and to bills of diſcovery merely; and will be afterwards treated of as applied to the ſeveral other ſpecies of bills. They may be ranked under the heads of, I. Pleas of matters recorded, or as of record, in the court itſelf, or ſome other court of equity; II. Pleas of matters *in pais*; and III. Pleas of matters of record, or matters in the nature of matters of record, in ſome court, not being a court of equity, either alone, or joined with matters *in pais*.

[g] Car. Rep. 61. Prac. Reg. 278.
[h] 2 Atkyns, 51.
[i] Prac. Reg. 279.
[k] Prac. Reg. 280.
[l] 3 Atkyns, 303, 304.

I. Pleas in bar of matters recorded, or as of record, in the court itſelf, or ſome other court of equity, may be, 1. a decree or order of the court, by which the rights of the parties are already determined [m], or another bill for the ſame cauſe diſmiſſed [n]; 2. another ſuit depending in the court, or in another court of equity, between the ſame parties, for the ſame cauſe [o]. Pleas of this nature generally go both to the diſcovery ſought, and the relief prayed, by the bill.

1. A decree, determining the rights of the parties, and ſigned and inrolled, may be pleaded to a new bill for the ſame matter; and this even if the party bringing the new bill was an infant at the time of the former decree. For a decree inrolled can only be altered upon a bill of review [p]. But the decree muſt be in its nature final, or afterwards made ſo by order, or it will not be a bar. Therefore a decree, for an account of principal and intereſt due on a mortgage, and for a foreclоſure in caſe of non-payment, cannot be pleaded to a bill to redeem, unleſs there is a final order of foreclоſure [q]. Nor can a decree, unleſs cauſe by default, be pleaded, without the order to make the decree abſolute. Upon a plea of this nature ſo much of the former bill and anſwer muſt be ſet forth, as is neceſſary to ſhew that the ſame point was then in iſſue [r]. A

m 3 Atkyns, 626.
n 1 Vern. 310.
o 3 Atkyns, 587. 590.
p 3 Atkyns, 626.
q 2 Veſey, 450.
r 2 Atkyns, 603. 2 Veſey, 577.

decree,

decree, diſmiſſing a former bill for the ſame matter, may be pleaded in bar [s], if the diſmiſſion was not, in terms, directed to be without prejudice [t]. The decree muſt be ſigned and inrolled, or it cannot be pleaded in bar of another ſuit [u], though it may be inſiſted upon by way of anſwer [x]. But though it cannot be pleaded directly in bar of the ſuit for want of inrolment, it might, perhaps, be pleaded to ſhew, that the bill was exhibited contrary to the uſual courſe of the court, and ought not therefore to be proceeded upon. For if the decree appeared upon the face of the bill, the defendant might demur [y]; a decree not ſigned and inrolled being to be altered only upon a re-hearing [z], as a decree ſigned and inrolled can be altered only upon a bill of review [a]. An order of diſmiſſion is a bar only where the court determined that the plaintiff had no title to the relief ſought by his bill; and therefore an order diſmiſſing a bill for want of proſecution is not a bar to another bill [b].

2. A plea, of another ſuit depending in the ſame or another court of equity, for the ſame cauſe [c], muſt aver that there have been proceedings in the ſuit; as appearance, or proceſs requiring appearance

[s] 1 Vern. 310. 1 Brown. Parl. Ca. 281.
[t] 1 Chan. Ca. 155.
[u] 3 Atkyns, 809.
[x] 2 Veſey, 577.
[y] 3 Atkyns, 809, 810. Bunbury, 56. 2 Veſey, 571.
[z] 2 Veſey, 598.
[a] 1 Ch. Ca. 44. 2 Freem. 179.
[b] 1 Atkyns, 571.
[c] Ord. in Ch. 98. Ed. 1739. 1 Ch. Ca. 241. 3 Atkyns, 587. 590.

at

at the leaſt [d]. It ſeems likewiſe regular to aver that the ſuit is ſtill depending [e]; though, as a plea of this nature is not uſually argued, but, being clearly a good plea, if true, is referred to the examination and enquiry of one of the maſters of the court as to the fact [f], it has been held, that a poſitive averment that the former ſuit is depending is not neceſſary [g]. For the ſame reaſon a plea of this kind is not put in upon oath [h]. It is not neceſſary to the ſufficiency of a plea of this nature, that the former ſuit ſhould be preciſely between the ſame parties as the latter. For if a man inſtitutes a ſuit, and afterwards ſells part of the property in queſtion to another, who files an original bill touching the part ſo purchaſed by him, a plea of the former ſuit depending touching the whole property will hold [i]. So where one part-owner of a ſhip filed a bill againſt the huſband for an account, and afterwards the ſame part-owner, and the reſt of the owners, filed a bill for the ſame purpoſe, the pendency of the firſt ſuit was held a good plea to the laſt [k]. For tho' the firſt bill was inſufficient for want of parties, yet by the ſecond bill the plaintiff was doubly vexed for the ſame cauſe. The courſe of the court in ſuch a caſe ſeems to be, to diſmiſs the firſt bill, and to direct the defendant in the ſecond cauſe to anſwer,

[d] 1 Eq. Ca. Ab. 39.
[e] 3 Atkyns, 589.
[f] Ord. in Ch. 98. Ed. 1739.
[g] 1 Vern. 332.
[h] 1 Vern. 332.
[i] 1 Eq. Ca. Ab. 39.
[k] Durand v. Hutchinſon, Mich. 1771.

upon

upon being paid the coſts of the plea allowed [l]. Where a ſecond bill is brought by the ſame perſon for the ſame purpoſe, but in a different right; as where the executor of an adminiſtrator brought a bill, conceiving himſelf to be the perſonal repreſentative of the inteſtate, and afterwards procured adminiſtration *de bonis non*, and brought another bill [m]; the pendency of the former bill is not a good plea. The reaſon of this determination ſeems to have been, that the firſt bill being wholly irregular, the plaintiff could have no benefit from it, and it might have been diſmiſſed upon demurrer. Where a decree is made upon a bill brought by a creditor, on behalf of himſelf and all other creditors of the ſame perſon, and another creditor comes in before the maſter to take the benefit of the decree, and proves his debt, and then files a bill on behalf of himſelf and the other creditors, the defendants may plead the pendency of the other ſuit; for a man coming in under a decree is *quaſi* a party [n]. The proper way for a creditor in ſuch a ſituation to proceed, if the plaintiff in the original ſuit is dilatory, is by application to the court for liberty to conduct the cauſe. If a plaintiff ſues a defendant, at the ſame time, for the ſame cauſe, at common law and in equity, the defendant, after anſwer put in, muſt apply to the court that the plaintiff may make his election where he will proceed, and cannot plead

[l] 1 Chan. Ca. 241.
[m] 2 Atkyns, 44.
[n] 3 Atkyns, 557.

the

the pendency of the ſuit at common law in bar of the ſuit in equity [o], though the practice was formerly otherwiſe [p].

II. Pleas in bar, of matters *in pais* only, ſometimes go both to the diſcovery ſought, and to the relief prayed, by the bill, or by ſome part of it; ſometimes only to the diſcovery, or part of the diſcovery; and ſometimes only to the relief, or part of the relief.

Pleas of this nature which may go both to the diſcovery and relief ſought by the bill, or by ſome part thereof, but which ſometimes extend no farther than the relief, are principally, 1. a want of title in the plaintiff; 2. a want of proper parties to the ſuit; 3. a ſtated account; 4. an award; 5. a releaſe; 6. a will; 7. a purchaſe, mortgage, or ſettlement, for a valuable conſideration, without notice of the plaintiff's claim.

1. A plea may be of want of title in the plaintiff, by reaſon of a diſability either in him or in the perſon under whom he claims. As if a plaintiff claims as purchaſer, and the defendant pleads that he was a papiſt, and incapable of taking by purchaſe [q]; or a plaintiff claims a real or perſonal eſtate accrued previous to conviction, either of himſelf or of the perſon under whom he claims, of ſome

[o] 3 P. Wms. 90.
[p] Ord. in Chan. 99. Ed. 1739.
[q] See, however, 18 Geo. III c. 60. by which this incapacity is, under certain conditions, removed.

offence

offence which occaſioned a forfeiture [r]; or previous to a bankruptcy; or any other want of title [s] in the plaintiff to the matter claimed by the bill. A plea of conviction of any offence which occaſions forfeiture, as manſlaughter, muſt be pleaded with equal ſtrictneſs as a plea of the ſame nature at common law [t]. Pleas of want of title in the plaintiff generally extend to the diſcovery ſought by the bill, as well as to the relief prayed [u].

2. If a want of proper parties is not apparent on the bill, a defendant may plead it [x]; and a plea of this nature goes both to the diſcovery and the relief. But where a ſufficient reaſon is ſuggeſted by the bill for not making the neceſſary party; as where a perſonal repreſentative is a neceſſary party, and the bill ſtates that the repreſentation is in conteſt in the eccleſiaſtical court [y]; or where a neceſſary party is reſident abroad, out of the juriſdiction of the court [z], and the bill charges that fact; or where the bill ſeeks a diſcovery of the neceſſary parties [a]; a plea for want of parties will not be allowed. A plea for want of parties to a bill for a diſcovery merely will not hold [b]; for the plaintiff in that caſe ſeeks no decree.

r 2 Atkyns, 399.
s Gilbert, 228
t 2 Atkyns, 399.
u Gilb. 229.
x 1 Vern. 110. 2 Atkyns, 51.
y 2 Atkyns, 51.
z Prec. in Ch. 83. 2 Atkyns, 510.
a 1 Vern. 95.
b 2 Eq. Ca. Ab. 170.

3. A plea

3. A plea of a ſtated account is a good bar to a bill for an account [c]. It muſt ſhew that the account was in writing, and the balance in writing; or at leaſt it muſt ſet forth the balance [d]. If the bill charges that the plaintiff has no counterpart of the account, the account ſhould be annexed by way of ſchedule to the anſwer, that if there are any errors upon the face of it, the plaintiff may have an opportunity of pointing them out [e]. If error or fraud are charged, they muſt be denied by the plea, as well as by way of anſwer [f]; and if neither error nor fraud are charged, the defendant muſt by the plea aver that the ſtated account is juſt and true, to the beſt of his knowlege and belief [g]. The delivery up of vouchers at the time the account was ſtated ſeems to be a proper averment in a plea of this nature [h], if the fact was ſuch.

4. An award may be pleaded to a bill to ſet aſide the award, and open the account [i]; and it is not only good to the merits of the caſe, but likewiſe to the diſcovery ſought by the bill [k]. But if fraud, or partiality, are charged againſt the arbitrators, thoſe charges muſt not only be denied by way of averment in the plea, but the plea muſt be ſupported by an anſwer ſhewing the arbitrators to have been incorrupt and impartial [l].

[c] 1 Vern. 180. 2 Atkyns, 1.
[d] 2 Atkyn 399.
[e] 3 Atkyns, 303.
[f] Gilb. on Ch 56.
[g] 3 Atkyns, 70.
[h] Gilb. on Ch 57.
[i] 2 Atkyns, 395. 501.
[k] 3 Atkyns, 529. 644.
[l] 2 Atkyns, 396. 501.

5. In

5. In a plea of a releaſe [m] the defendant muſt ſet out the conſideration upon which the releaſe was made. If a releaſe is pleaded to a bill for an account, it muſt be under ſeal; otherwiſe it muſt be pleaded as a ſtated account only [n].

6. To a bill brought, upon ſome ground of equity, by an heir at law againſt a deviſee, to turn the deviſee out of poſſeſſion, the deviſee may plead the will, and that it was duly executed, and ought to prevail, until upon an iſſue at law it ſhould be found to be otherwiſe [o]. But if the bill prays a receiver, and the plea goes to that part of the bill, it will be ſo far over-ruled; as it may be neceſſary for the court in the progreſs of the cauſe to appoint a receiver [p].

7. A plea of purchaſe for a valuable conſideration, or of a mortgage without notice of the plaintiff's title, is a bar to a ſuit in equity [q]. Such a plea muſt aver, that the perſon who conveyed, or mortgaged, to the defendant, was ſeiſed in fee, or pretended to be ſeiſed [r], and was in poſſeſſion [s], if the conveyance purported an immediate transfer of the poſſeſſion, at the time when he executed the pur-

[m] 2 Veſey, 108. Hardres, 168.

[n] Gilb. on Ch. 57.

[o] 3 Atkyns, 17. Anſtis v. Dowſing, cited 2 Veſey, 361. Meadows v. ducheſs of Kingſton, Mich. 1777.

[p] 3 Atkyns, 17. and Meadows v. ducheſs of Kingſton. But ſee 2 Veſey, 362, 363.

[q] 2 Atkyns, 397. 630. 2 Ventris, 361.

[r] 3 P. Wms. 281.

[s] 1 Vern. 246.

chaſe,

chaſe or mortgage deed [t]. It muſt aver a conveyance, and not articles merely [u]; for if there are articles only, and the defendant is injured, he muſt ſue at law upon the covenants in the articles [x]. It muſt aver the conſideration, and the actual payment of it; for if it is only ſecured to be paid it is not ſufficient [y]. The plea muſt alſo deny notice of the plaintiff's title, or claim [z], previous to the execution of the deeds, and payment of the conſideration [a]; and the notice ſo denied muſt be notice of the exiſtence of the plaintiff's title, and not merely notice of the exiſtence of a perſon who could claim under that title [b]. If particular inſtances of notice or circumſtances of fraud are charged, they muſt be denied as ſpecially and particularly as charged in the bill [c]. This ſpecial and particular denial, of notice or fraud, muſt be by way of anſwer, that the plaintiff may be at liberty to except to its ſufficiency [d]. But notice, and fraud, muſt alſo be denied, generally, by way of averment in the plea; otherwiſe the fact of notice, or of fraud, will not be in iſſue [e]. Notice, or fraud, thus put in iſſue, if

[t] 3 P. Wms. 281.
[u] 3 P. Wms. 281.
[x] 1 Atkyns, 571.
[y] 3 Atkyns, 304. 814.
[z] 1 Vern. 179.
[a] 1 Ch. Ca. 74. 2 Atkyns, 631. 3 Atkyns, 304.
[b] 1 Atkyns, 522.
[c] 3 Atkyns, 815. 2 Veſey, 450.
[d] 1 Vern. 185.
[e] 3 P. Wms. 95. Gilb. on Ch. 58. Contr. 3 P. Wms. 244. In the caſe of Meadows v. ducheſs of Kingſton, Mich. 1777, the chancellor ſeemed to be of opinion, that notice, and fraud, were to be denied by way of averment in the plea, in caſes only where

if proved, will effectually open the plea on the hearing of the cauſe. A purchaſor with notice, of a purchaſor without notice, may ſhelter himſelf under the firſt purchaſor [f]. But notice to an agent is notice to the principal [g]; and where a perſon, having notice, purchaſed in the name of another who had no notice, and knew nothing of the purchaſe, but afterwards approved it, and without notice paid the purchaſe-money, and procured a conveyance; the perſon firſt contracting was conſidered from the beginning as the agent of the actual purchaſor, who was therefore held affected with notice [h]. A ſettlement in conſideration of marriage is equivalent to a purchaſe for a valuable conſideration, and may be pleaded in the ſame manner [i]. If a ſettlement is made after marriage, in purſuance of an agreement before marriage, the agreement, as well as the ſettlement, muſt be ſhewn [k]. A widow, defendant to a ſuit brought by any perſon claiming under her huſband, to diſcover what lands ſhe is in poſſeſſion of, and what is her title, may plead her ſettlement in bar to any diſcovery, unleſs the plaintiff offers [l], and

where the denial made part of an equitable defence; as in a plea of purchaſe for valuable conſideration, the denial of notice muſt be by way of averment in the plea, becauſe the want of notice creates the equitable bar.

[f] Prec. in Ch. 51. 1 Atkyns, 571. 2 Atkyns, 139. 242.

[g] 2 Vern. 574.

[h] 1 Brown. Parl. Ca. 244. 2 Brown. Parl. Ca. 596.

[i] Rep. Temp. Finch, 9.

[k] 1 Vern. 139.

[l] 2 Veſey, 450.

is able, to confirm her jointure. But a plea of this nature muſt ſet forth the ſettlement, and the lands comprized in it, with ſufficient certainty [m]. A plea of purchaſe for a valuable conſideration protects a defendant from giving any anſwer to a title ſet up by the plaintiff; but a plea of bare title only, without ſetting forth any conſideration, is not ſufficient for that purpoſe [n]. Upon a plea of purchaſe for a valuable conſideration, to a diſcovery of deeds and writings, the purchaſe deed muſt be excepted; for it is pleaded [o].

Upon a ſimilar ground, if a bill is filed for diſcovery of goods purchaſed of a bankrupt, the defendant may plead that he purchaſed them *bona fide*, for a valuable conſideration, paid before the commiſſion of bankrupt was ſued out, and before he had any notice of the bankruptcy [p].

Pleas in bar, of matters *in pais* only, which extend no farther than the diſcovery ſought by the bill, or by ſome part thereof, may be, 1. that the diſcovery may ſubject the defendant to pains and penalties; 2. that it may ſubject him to a forfeiture, or ſomething in the nature of a forfeiture; 3. that it would betray the confidence repoſed in a counſel, attorney, or arbitrator. And any other matter, which may ſhew that the defendant ought not to

[m] 1 Atkyns, 52.
[n] 2 Atkyns, 241.
[o] 2 Veſey, 107.
[p] 2 Chan. Ca. 72, 73. 1 Vern. 27.

be

be compelled to make the diſcovery ſought, for ſimilar reaſons, may be pleaded in like manner.

1. It has been already obſerved, that no perſon is bound to anſwer ſo as to ſubject himſelf to puniſhment, in whatever manner that puniſhment ariſes, or whatever is the nature of the puniſhment [q]. If, therefore, a bill requires an anſwer which may ſubject the defendant to any pains or penalties, or tend to accuſe him of any crime, and this is not ſo apparent upon the face of the bill that the defendant can demur, he may by plea ſet forth by what means he may be liable to puniſhment, and inſiſt he is not bound to anſwer the bill, or ſo much thereof as the plea will cover [r]. Thus if a bill is brought for diſcovery of a marriage, where the fact, if true, may ſubject the party to puniſhment in the eccleſiaſtical court for inceſt, the defendant may plead the matters to ſhew that the marriage, if real, was inceſtuous, and would ſubject the parties to pains and penalties [s]. But if the diſcovery ſought is not of a fact which can ſubject the defendant to any penalty, though connected with ſome other fact which may; as where a queſtion is, whether the defendant has a legitimate ſon; the defendant is bound to anſwer. For the diſcovery of that fact cannot ſubject him to a penalty, though the diſcovery of his marriage

[q] Pag. 64. See 2 Veſey, 245. 1 Vern. 109.

[r] 1 Vern. 110.

[s] 2 Veſey, 243.

with the mother of the ſon may; and therefore he ſhall not be compelled to diſcover the marriage [t].

2. It has been alſo already [u] obſerved, that no perſon is bound to anſwer ſo as to ſubject himſelf to any forfeiture, or to any thing in the nature of a forfeiture [x]. If this is not apparent on the bill, the defence muſt be made by way of plea. But ſuch a plea will only bar the diſcovery of the fact which would occaſion a forfeiture. Therefore, where a tenant for life pleaded, to a bill for diſcovery whether he was tenant for life or not, that he had made a leaſe for the life of another, which, if he was tenant for his own life only, might occaſion a forfeiture, the plea was over-ruled [y]. So upon a bill charging the defendant to be tenant for life, and that he had committed waſte, he may plead to the diſcovery of the act which would occaſion the forfeiture, the waſte; but he cannot plead to the diſcovery whether he was tenant for life, or not [z]. So upon a bill to diſcover whether the defendant was an alien, and whether her child was an alien, and where born, it was held the defendant was not bound to diſcover whether ſhe was herſelf an alien, but ſhe was compelled to diſcover whether her child was an alien, and where born [a]. In all caſes of forfeiture, if the plaintiff is intitled alone to the benefit of the forfeiture [b], and waives it by his bill, the de-

[t] 2 Veſey, 493.
[u] Pag. 66.
[x] 1 Atkyns, 526.
[y] 2 Veſey, 108.
[z] 2 Veſey, 109.
[a] 2 Veſey, 494.
[b] Moſely, 75.

fendant

fendant will be compelled to make the diſcovery required. And though the plaintiff is not intitled to the benefit of the forfeiture, yet if the defendant has by his own agreement bound himſelf not to inſiſt on being protected from making the diſcovery, the court will compel him to make it [c].

3. If a bill ſeeks a diſcovery of a fact from one whoſe knowlege of the fact was derived from the confidence repoſed in him as a counſel, an attorney, or an arbitrator, he may plead, in bar of the diſcovery, that his knowlege of the fact was ſo obtained [d].

III. Pleas in bar, of matters of record, or of matters in the nature of matters of record, in ſome court not being a court of equity, either alone, or joined with matters *in pais*, likewiſe extend ſometimes both to the diſcovery, and the relief, ſought by the bill, or by ſome part thereof; ſometimes only to the diſcovery, or part of the diſcovery; and ſometimes only to the relief, or part of the relief.

Pleas of this nature may be, 1. a fine, and non-claim: 2. a recovery, and the deed to lead, or declare, the uſes thereof: 3. a judgment at law, or ſentence of ſome other court: 4. ſome ſtatute; as the ſtatute of frauds, and perjuries; the ſtatute of limitations; or any other ſtatute which is a bar to the demands of the plaintiff.

[c] Moſely, 77, and the caſes there cited.

[d] 1 Ch. Ca. 277.

1. A plea of a fine and non-claim, though a legal bar, yet is equally good in equity [e], provided it is pleaded with proper averments [f]. Where a title is merely legal, though the defect is apparent upon the face of the deeds, yet the fine will be a bar in equity, and a purchaſor will not be affected with notice ſo as to make him a truſtee for the perſon who had the right. For a defect upon the face of title deeds is often the occaſion of a fine being levied [g]. And even a fine levied upon bare poſſeſſion, with non-claim, may be a bar in equity, if a legal bar, though with notice at the time the fine was levied [h]. But with reſpect to equitable titles there is a diſtinction. For where the equity charges the lands only, the fine bars. But where it charges the perſon only, in reſpect of the land, it does not bar [i]. Therefore if a man purchaſes from a truſtee, and levies a fine, he ſtands in the place of the ſeller, and is as much a truſtee as the ſeller was [k]; provided he has notice of the truſt, or is a purchaſor without conſideration [l]. So if the grantee of a mortgagee levies a fine, that will not diſcharge the equity of redemption [m]. But there are caſes, both of legal and equitable titles, in which a fine and non-claim will bar,

[e] W. Jones, 416. 1 Ch. Ca. 278.
[f] 2 Atkyns, 631. 3 Atkyns, 303.
[g] 2 Atkyns, 631.
[h] 2 Atkyns, 240.
[i] 1 Ch. Ca. 278. 2 Atkyns, 390.
[k] 2 Atkyns, 631.
[l] Gilb. on Ch. 62.
[m] 2 Atkyns, 631. Contr. 2 Freem. 21, 69.

notwith-

notwithſtanding notice at the time of levying the fine [n]. If a fine is levied where the legal eſtate is in truſtees for an infant, and the truſtees neglect to claim, the infant, claiming by bill within five years after he attains twenty-one, ſhall not be barred [o]. But, perhaps, this ſhould be underſtood as referring to the caſe of a fine levied with notice of the title of the infant [p]. Where a title to lands is merely equitable, as in the caſe of an agreement to ſettle lands to particular uſes, claim to avoid the fine muſt be by *ſubpœna* [q]. The pendency of a ſuit in equity will, therefore, in equity, prevent the running of a fine [r]. Upon the whole, wherever a perſon comes in by a title oppoſite to the title to a truſt eſtate; or comes in under the title to the truſt eſtate, for a valuable conſideration, without fraud, or notice of fraud, or of the truſt; a fine and non-claim may be ſet up as a bar to a claim of a truſt [s]. When a fine and non-claim are ſet up as a bar to a claim of a truſt, by a perſon claiming under the ſame title, it is not ſufficient to aver, that, at the time the fine was levied, the ſeller of the eſtate, being ſeiſed, or pretending to be ſeiſed, conveyed; but it is neceſſary to aver, that the ſeller was actually ſeiſed. It is not, indeed, requiſite to aver, that the ſeller was ſeiſed in fee; an averment that he

[n] 2 Atkyns, 631. 3 Atkyns, 303. 560.
[o] 2 Vern. 368.
[p] 3 P. Wms. 309. 310.
[q] 1 Ch. Ca. 278. 2 Freem. 21.
[r] 2 Atkyns, 389. 90.
[s] Gilb. on Ch. 63.

was ſeiſed *ut de libero tenemento*, and being ſo ſeiſed, a fine was levied, will be ſufficient [s]. A fine and non-claim may be pleaded in bar to a bill of review [t].

2. To a claim under an entail, a recovery duly ſuffered, with the deed to lead the uſes of that recovery, may be pleaded; if the eſtate limited to the plaintiff, or under which he claims, is thereby deſtroyed.

3. To a bill to ſet aſide a judgment, as obtained againſt conſcience, the defendant may plead the verdict, and judgment, in bar [u]. But if there is any charge of fraud, or any circumſtance ſhewn as a ground for relief, the judgment cannot be pleaded; unleſs the fraud, or other circumſtance, the ground upon which the judgment is ſought to be impeached, be denied, and thus put in iſſue by the plea. A ſentence in a foreign court may be a proper defence by way of plea; but the court pronouncing the ſentence muſt at leaſt have full juriſdiction to determine the rights of the parties [x]. Upon the ſame ground, plea of a will and probate in the proper eccleſiaſtical court, is a good plea to a bill by perſons claiming as next of kin of a perſon ſuppoſed to have died inteſtate [y]. Even if fraud in obtaining the will is charged, that is not a ſufficient equitable ground to impeach the probate; for the parties may reſort to the eccleſiaſtical court, which

[s] 2 Atkyns, 630.
[t] 2 Vern. 190.
[u] 3 Atkyns, 223.
[x] 3 Atkyns, 215.
[y] 1 Vern. 397.

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is competent to determine of the fraud [z]. But where the fraud practiſed has not gone to the whole will, but only to ſome particular clauſe; or if the fraud has been practiſed to obtain the conſent of the next of kin to the probate; the courts of equity have laid hold of theſe circumſtances to declare the executor a truſtee for the next of kin [a]. Where there are no ſuch circumſtances, the probate of the will is a clear bar to a demand of perſonal eſtate; and if the teſtator died in a foreign country, and left no goods in any other country, probate of the will according to the law of that country is ſufficient [b].

4. To a bill for diſcovery of a truſt, the ſtatute of frauds and perjuries [c], with an averment that there was no declaration of truſt in writing, may be pleaded [d]. The ſame ſtatute, with an averment that a will was not duly executed as required by the ſtatute, is a good plea to a bill brought by a deviſee, claiming under the will. To a bill for a ſpecific performance of an agreement, the ſame ſtatute, with an averment that there was no agreement in writing, ſigned by the parties, may be pleaded [e]. But in all theſe caſes, if any matter is charged by the bill which may avoid the bar created

[z] 2 Vern. 8. 76. 2 Ch. Ca. 178. 1 P. Wms. 389. 2 P. Wms. 286. Meadows v. ducheſs of Kingſton, Michaelmas 1777.

[a] 1 Strange, 666. Gilb. 203. 1 Veſey, 284.

[b] 1 Vern. 397.

[c] 29 Car. II. c. 3.

[d] 2 Atkyns, 156.

[e] Prec. in Ch. 402. 533.

by

by the ſtatute, that matter muſt be denied, generally, by way of averment in the plea; and it muſt be denied, particularly, and preciſely, by way of anſwer to ſupport the plea. The ſtatute of limitations [f] is likewiſe a good plea [g]. But if a bill charges a fraud, and that the fraud was not diſcovered till within ſix years before filing the bill, the ſtatute is not a good plea, unleſs the defendant denies the fraud, or avers that the fraud, if any, was diſcovered ſix years before filing the bill [h]. And though the ſtatute of limitations is a bar to the claim of a debt, it is not to a diſcovery when the debt became due; for if that is ſet forth, it will appear to the court whether the time limited by the ſtatute is elapſed [i]. Where a particular ſpecial promiſe is charged to avoid the operation of the ſtatute, the plaintiff muſt deny the promiſe charged by averment in the plea [k], as well as by anſwer to ſupport the plea. Where the demand is of any thing executory, as a note for payment of an annuity, or of money at a diſtant period, or by inſtalments, the defendant muſt aver that the cauſe of action hath not accrued within ſix years; becauſe the ſtatute bars only as to what was actually due ſix years before the action brought [l]. Upon a bill for diſcovery of a title, charging fraud, and praying

[f] 21 Ja. I. c. 16.
[g] 3 P. Wms. 309. 2 Atkyns, 395. Gilb. on Ch. 61.
[h] 3 P. Wms. 143.
[i] 2 Atkyns, 51.
[k] 3 Atkyns, 70.
[l] 3 Atkyns, 71.

poſſeſſion,

poſſeſſion, the ſtatute of limitations alone is not a good plea to the diſcovery; for the defendant muſt anſwer to the charge of fraud [m]. The ſtatute of limitations may be pleaded to a bill to redeem a mortgage, if the mortgagee has been in poſſeſſion twenty years [n]; and indeed a demurrer has been allowed in this caſe, where the poſſeſſion has appeared upon the face of the bill [o], though later caſes ſeem to be to the contrary [p]. To a bill, on an equitable title to preſentation to a living, ſeeking to compel the defendant to reſign, plenarty for ſix months before the bill was filed may be pleaded in bar; the ſtatute of Weſtminſter 2 [q] being conſidered for this purpoſe as a ſtatute of limitation, in bar of an equitable, as well as of a legal, right [r]. But if a *quare impedit* is brought before the ſix months are expired, though the bill is filed after, it may be in ſome caſes a ground for the court to interfere [s], and conſequently the plenarty would not in ſuch caſes be pleadable in bar.

In the ſame manner, any other ſtatute, which may be a bar to the demands of the plaintiff, may be pleaded, with the averments neceſſary to bring the caſe of the defendant within the ſtatute, and to avoid any equity which may be ſet up againſt the bar created by the ſtatute. And if a diſcovery

[m] 3 Atkyns, 558.
[n] 3 Atkyns, 225.
[o] 3 P. Wms. 287. Note B.
[p] 3 Atkyns, 225, 226, and the authorities there cited.
[q] 13 Edw. I. c. 5.
[r] 2 P. Wms. 404. 3 Atkyns, 459.
[s] 2 P. Wms. 405.

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is ſought which may ſubject the defendant to the penalties of any ſtatute, he may plead that ſtatute in bar of the diſcovery. Thus where a bill ſought a diſcovery, whether the defendant had become a purchaſor of an eſtate, of which the ſuppoſed ſeller was not in poſſeſſion, the defendant pleaded the ſtatute of 32 Hen. VIII. c. 9. againſt ſelling, or contracting to ſell, any pretended rights or titles [t]. So where a bill was brought by inſurers, for a diſcovery of what goods had been ſhipped on board a veſſel, the defendant pleaded the ſtatutes which make it penal to export wool. He was however directed to anſwer ſo far as to diſcover what goods were on board the veſſel beſides wool [u]. In the ſame manner, ſtatutes which occaſion forfeitures, or any thing in the nature of a forfeiture, may be pleaded. Thus to a bill, ſeeking a diſcovery, whether a perſon under whom the defendant claimed, was a papiſt, the defendant pleaded his title, and the ſtatute of 11 and 12 Will. III. diſabling papiſts [x].

Pleas in bar have been hitherto conſidered with reference only to the two kinds of bills moſt common in practice. The ſame grounds of plea will likewiſe hold in many caſes to the ſeveral other kinds of bills, according to their reſpective natures, except to a certiorari bill [y]. But ſome of

[t] 3 P. Wms. 375.

[u] 1 Atkyns, 53.

[x] 1 Atkyns, 526. 528. 2 Veſey, 389.

[y] See, however, 3 Chan. Rep. 66. where a plea, to a certiorari bill, of a decree in the inferior court, is mentioned.

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the other kinds of bills admit of a peculiar defence by way of plea.

Thus, to a bill of interpleader, if the plaintiff, or either of the defendants, has no right, both of the defendants in the firſt caſe, and the defendant having right in the ſecond, may plead the matter neceſſary to ſhew that the plaintiff, or the other defendant, has no right; and, conſequently, either that there is no ſubject of interpleader, or that the plaintiff has no right to compel the defendants to interplead.

To a bill to perpetuate the teſtimony of witneſſes, the defendant may plead any thing which ſhews that the plaintiff has no intereſt in the matter to which he prays liberty to examine, or that the defendant has an equal title to the protection of a court of equity. As if a bill is brought to perpetuate the teſtimony of witneſſes to a will, and the defendant pleads a ſubſequent will, or that he is a purchaſor for a valuable conſideration without notice of the will [z]; or that the matter, to which the plaintiff prays leave to examine his witneſſes, is capable of being immediately tried at law, and that the plaintiff has not eſtabliſhed his right at law [a].

If a bill of revivor is brought, without ſufficient cauſe to revive the ſuit againſt the defendant, and this is not apparent on the bill, the defendant may plead the matter neceſſary to ſhew that the plaintiff

[z] 1 Vern. 354. [a] 1 Vern. 303. 312.

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is not intitled to revive the ſuit againſt him [b]. Or if the plaintiff is not intitled to revive the ſuit at all, though a title is ſtated in the bill, ſo that the defendant cannot demur, the objection to the plaintiff's title may alſo be taken by way of plea. If a ſupplemental bill is brought upon matter which aroſe before the original bill was filed, and this is not apparent on the bill, the defendant may plead that fact. Bills in the nature of bills of revivor and ſupplement are liable to the ſame pleas.

A croſs bill differing in nothing from the firſt ſpecies of bills, with reſpect to which pleas in bar have in general been conſidered, except that it is always occaſioned by a former bill, it is not liable to any plea which will not hold to the firſt ſpecies of bills. And a croſs bill is not liable to ſome pleas which will hold to the firſt ſpecies of bills; as pleas to the juriſdiction of the court, and pleas to the perſon of the plaintiff, the ſufficiency of which ſeem both affirmed by the original bill; unleſs the croſs bill is exhibited in the name of ſome perſon alone, who is alone incapable of inſtituting a ſuit, as an infant, a feme covert, an idiot, or a lunatic.

It has been already mentioned [c], that a part of the conſtant defence to a bill of review, for error apparent on a decree, is by a plea of the decree [d]. Where any matter beyond the decree, as length of time, a purchaſe for a valuable conſideration, or

[b] 3 P. Wms. 348.
[c] Pag 73.
[d] 1 Vern. 392. Nelſon's Rep. 53.

any

any other matter, is to be offered againſt opening of the inrolment, that matter muſt alſo be pleaded [e]. A bill of review, upon the diſcovery of new matter, ſeems liable to any plea which would have avoided the effect of that matter, if charged in the original bill. Supplemental bills in the nature of bills of review ſeem to be in the ſame ſituation; and if the matter alleged to have been diſcovered ſince the decree, came to the plaintiff's knowlege before the decree, the defendant to the bill may plead this fact in bar [f]. If a decree is ſought to be impeached on the ground of fraud, the proper defence ſeems to be a plea of the decree, accompanied by a denial of the fraud charged [g].

If a plaintiff, filing a bill to carry a decree into execution, has no right to the benefit of the decree, the defendant may plead the fact, if it is not ſo apparent on the bill as to admit of a demurrer.

A bill, filed by the direction of the court, for the purpoſe of obtaining its decree touching ſome matter not in iſſue by a former bill, is not likely to be expoſed to a defence by plea, as it is generally conſidered by the court before it is directed to be brought. But in its nature it is open to almoſt every plea already mentioned, except, perhaps, pleas to the juriſdiction of the court, and to the perſon of the plaintiff. Indeed if the bill is miſtakenly brought

[e] 2 Veſey, 109.
[f] 2 Atkyns, 40.
[g] 1 Brown. Parl. Ca. 414.

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in the name of a perſon alone, who is alone incapable of inſtituting a ſuit, a plea to the perſon of the plaintiff will hold.

Having thus conſidered ſome of the principal grounds upon which pleas may be ſupported, it may be proper to obſerve ſome particulars which are neceſſary to be attended to in framing pleas in general.

In pleading there muſt be the ſame ſtrictneſs in equity as at law [h]; at leaſt in matter of ſubſtance. A plea in bar muſt follow the bill, and not evade it, or miſtake the ſubject of it [i]. It muſt be *ad idem* [k]. A plea may be bad in part, and not in the whole [l]. This, however, muſt be underſtood with exceptions [m]. If a plea does not go to the whole bill, it muſt expreſs to what part of the bill the defendant pleads; and therefore a plea, to ſuch parts of the bill as are not anſwered, muſt be over-ruled, as too general [n]. So if the parts of the bill, to which the plea extends, are not clearly and preciſely expreſſed; as if a plea is general, with an exception of matters after mentioned, and is accompanied by an anſwer; the plea is bad. For the court cannot judge what the plea covers, without looking into the anſwer, and determining whether it is ſufficient or not, before the validity of the plea can be conſidered [o].

[h] 2 Atkyns, 632.
[i] Bunb. 70.
[k] 2 Atkyns, 603.
[l] 1 Atkyns, 53.
[m] 1 Veſey, 205.
[n] 3 Atkyns, 70. Moſely, 40.
[o] 2 Veſey, 108.

A plea

A plea muſt aver facts to which the plaintiff may reply, and not, in the nature of a demurrer, reſt on facts in the bill [p]. This, however, is not a very ſtrict rule; and where a matter, though ground of demurrer, is negative; as the want of the uſual affidavit to a bill for diſcovery of deeds, and for relief; it may, though perhaps not regularly, be pleaded. The averments in a plea ought, in general, to be poſitive. But in ſome caſes a defendant has been permitted to aver according to the beſt of his knowlege and belief; as that an account is juſt and true [r]. And in all caſes of negative averments, and of averments of facts not within the immediate knowlege of the defendant, it may ſeem improper to require a poſitive aſſertion. But unleſs the averment is poſitive, the matter in iſſue appears to be, not the fact itſelf, but the defendant's belief of it. And the conſcience of the defendant is ſaved by the nature of the oath adminiſtered; which is, that ſo much of the plea as relates to his own acts is true, and that ſo much as relates to the acts of others he believes to be true. All the facts neceſſary to render the plea a complete equitable bar to the caſe made by the bill, ſo far as the plea extends, that the plaintiff may take iſſue upon it [s], muſt be clearly and diſtinctly averred. Averments are likewiſe neceſſary, to exclude intendments which would otherwiſe be made againſt the pleader; and the

[p] 3 Atkyns, 558.
[r] 3 Atkyns, 70. Tothill, 70.
[s] Gilb. on Ch 58.

averments muſt be ſufficient to ſupport the plea [t]. If there is any charge in the bill, which is an equitable circumſtance in favour of the plaintiff's caſe againſt the matter pleaded; as fraud, or notice of title; that charge muſt be denied by way of anſwer, as well as by averment in the plea. In this caſe the anſwer muſt be full and clear, or it will not be effectual to ſupport the plea [u]; for the court will intend the matters ſo charged againſt the pleader, unleſs they are fully and clearly denied [x]. Though the court, upon argument of the plea, may hold theſe charges ſufficiently denied by the anſwer to exclude intendments againſt the pleader, yet if the plaintiff thinks the anſwer to any of them is evaſive, he may except to the ſufficiency of the anſwer in thoſe points. A defendant may alſo ſupport his plea by an anſwer touching any thing not charged by the bill, as notice of a title, or fraud. For by ſuch an anſwer nothing is put in iſſue covered by the plea from being put in iſſue [y], and the anſwer can only be uſed to ſupport, or diſprove, the plea. But if a plea is coupled with an anſwer to any part of the bill covered by the plea, and which conſequently the defendant by the plea declines to anſwer, the plea will upon argument be over-ruled [z].

If the plaintiff conceives a plea to be defective in point of form, or ſubſtance, he may take the judgement of the court upon its ſufficiency. And if the

[t] 2 Veſey, 245.

[u] 3 Atkyns, 304, 815. 3 P. Wms. 145. 3 Brown, Parl. Ca. 373, 374.

[x] 2 Atkyns, 241. Gilb. 185.

[y] Gilb. on Ch. 58, 59.

[z] 2 Atkyns, 155. Gilb. on Ch. 58.

plea

plea is allowed upon argument; or the plaintiff, without argument, thinks it, though good in form and ſubſtance, not true in point of fact; he may take iſſue upon it, and proceed to diſprove the facts upon which it is endeavoured to be ſupported [a]. For if the plea is, upon argument, held to be good in law; or the plaintiff admits it to be ſo by replying to it; the truth of the plea is the only ſubject of queſtion remaining, ſo far as the plea extends; and nothing but the matters contained in the plea, as to ſo much of the bill as the plea covers, is in iſſue between the parties [b]. If, therefore, iſſue is thus taken upon the plea, the defendant muſt prove the facts it ſuggeſts. If he fails in this proof, ſo that at the hearing of the cauſe the plea is held to be no bar, the plaintiff is not to loſe the benefit of the diſcovery ſought by the bill, but the court will order the defendant to be examined on interrogatories, to ſupply the defect [c]. But if the defendant proves the truth of the matter pleaded, the ſuit, ſo far as the plea extends, is barred; even though the plea is not good, either in point of form or ſubſtance. Therefore if a defendant pleads a purchaſe for a valuable conſideration, and omits to deny notice, and the plaintiff replies; the plea, though irregular, is admitted to be good, and the fact of notice not being in iſſue, the defendant, proving what he has pleaded, is intitled to have the bill diſmiſſed [d].

[a] Prac. Reg. 283.
[b] 3 P. Wms. 95. Prec. in Ch. 58. 1 Ch. Rep. 174.
[c] Nelſ. Rep. 119.
[d] 3 P. Wms. 94, 95.

If a plea requires an anſwer to ſupport it, upon argument of the plea the anſwer may be read to counterprove the plea; and if the defendant appears not to have ſufficiently ſupported his plea by his anſwer, the plea muſt be over-ruled, or ordered to ſtand for an anſwer only [e]. A plea is uſually ordered to ſtand for an anſwer, where it ſtates matter which may be a defence to the bill, though perhaps not proper for a plea, or informally pleaded. But if a plea ſtates nothing which can be a defence, it is merely over-ruled. If a plea is ordered to ſtand for an anſwer, it is allowed to be a ſufficient anſwer to ſo much of the bill as it covers [f]; unleſs by the order liberty is given to except [g]. But that liberty may be qualified, ſo as to protect the defendant from any particular diſcovery which he ought not to be compelled to make [h]. And if a plea is accompanied by an anſwer, and is ordered to ſtand for an anſwer, without liberty to except, the plaintiff may yet except to the anſwer, as inſufficient to the parts of the bill not covered by the plea [i]. If a plea, accompanied by an anſwer, is allowed, the anſwer may be read, at the hearing of the cauſe, to counterprove the plea [k].

There are ſome pleas which are not uſually argued [l]; but, being clearly bars, if true, either they are pleaded with ſuch circumſtances that their

[e] 3 Atkyns, 304.
[f] Moſeley, 74.
[g] 3 Atkyns, 815. 3 P. Wms 239.
[h] 2 Atkyns, 241.
[i] Moſeley, 74.
[k] 3 Atkyns, 303.
[l] Ord. in Ch 98. Ed. 1739.

truth

truth cannot be diſputed, or, being mere matter of fact, they are referred to one of the maſters of the court to inquire into the truth of the fact. Such are pleas of outlawry, or excommunication, which are always pleaded *ſub ſigillo*. Pleas of a former decree [m], or of another ſuit depending [n], are generally in the ſame predicament, being referred to a maſter to inquire into the fact. If, in any of theſe caſes, the maſter reports the fact true, the bill ſtands inſtantly diſmiſſed, unleſs the court otherwiſe orders [o]. But the plaintiff may except to the maſter's report, and bring on the matter to be argued before the court [p]. And if the plaintiff conceives the plea to be defective, in point of form, or otherwiſe, independent of the mere truth of the fact pleaded, he may ſet down the plea to be argued as in the caſe of pleas in general [q].

Pleas to the juriſdiction of the court, or in diſability of the perſon of the plaintiff, or defendant [r]; or pleas in bar of any matter of record, or of matters recorded, or as of record in the court itſelf [s], or any other court; need not be upon oath. But pleas in bar, of matters *in pais*, muſt be upon oath [t].

[m] 1 Atkyns, 53, 54.
[n] Ord. in Ch. 98. Ed. 1739.
[o] See 1 Ch. Ca. 241.
[p] Durand v. Hutchinſon, Mich. 1771 on Exceptions.
[q] Ord. in Ch. 98. Ed. 1739. 3 Atkyns, 587. 1 Vern. 332.
[r] Ord. in Ch. 96.
[s] Prac. Reg. 174.
[t] Ibid.

CHAP. V.

Of Anſwers, and Diſclaimers; of Exceptions to Anſwers; and of Demurrers, Pleas, Anſwers, and Diſclaimers, or any two, or more of them, jointly.

IF a plea is over-ruled, the defendant may inſiſt on the ſame matter by way of anſwer [u]. And whatever part of a bill is not covered by demurrer, or plea, muſt be defended by anſwer, unleſs the defendant diſclaims. It has been already [x] mentioned, that every plaintiff is intitled to a diſcovery from the defendant of the matters charged in the bill, provided they are neceſſary to aſcertain facts material to the merits of his caſe, and to enable him to obtain a decree. The plaintiff may require this diſcovery, either becauſe he cannot prove the facts, or in aid of proof, and to avoid expence [y]. He is alſo intitled to a diſcovery of matters neceſſary to ſubſtantiate the proceedings, and make them regular and effectual in a court of equity [z]. However, if the diſcovery ſought by a bill is matter of ſcandal, or will ſubject the defendant to any pain, penalty, or forfeiture, he is not bound to make it;

[u] 3 P. Wms. 95. 2 Veſey, 492. 1 Atkyns, 450.
[x] Pag. 44.
[y] 2 Atkyns, 241.
[z] 2 Veſey, 492.

and

and if he does not think proper to defend himſelf from the diſcovery by demurrer, or plea, according to the circumſtances of the caſe, he may by anſwer inſiſt that he is not obliged to make the diſcovery [a]. In this caſe the plaintiff may except to the defendant's anſwer as inſufficient; and upon that exception it will be determined whether the defendant is or is not obliged to make the diſcovery. If the defence which can be made to a bill conſiſts of a variety of circumſtances, ſo that it is not proper to be offered by way of plea [b]; or if it is doubtful whether as a plea it will hold; the defendant may ſet forth the whole by way of anſwer, and pray the ſame benefit of ſo much as goes in bar, as if it had been pleaded to the bill [c]. Or if the defendant can offer a matter of plea which would be a complete bar, but has no occaſion to protect himſelf from any diſcovery ſought by the bill, and can offer circumſtances which he conceives to be favourable to his caſe, and which he could not offer together with a plea, he may ſet forth the whole matter in the ſame manner. Thus if a purchaſor for a valuable conſideration, clear of all charges of fraud, or notice, can offer additional circumſtances in his favour which he cannot ſet forth by way of plea, or of anſwer to ſupport a plea; as the expending a conſiderable ſum of money in improvements, with the knowlege of the plaintiff; it may be more pru-

[a] 3 P. Wms. 238. 2 Vefey, 491.

[b] 1 Atkyns, 54.

[c] 2 P. Wms. 145.

dent to ſet forth the whole by way of anſwer, than to rely on the ſingle defence by way of plea. To ſo much of the bill as it is neceſſary and material for the defendant to anſwer, he muſt ſpeak directly, and without evaſion; and muſt not merely anſwer the ſeveral charges literally, but he muſt confeſs, or traverſe, the ſubſtance of each charge [d]. And wherever there are particular and preciſe charges, they muſt be anſwered particularly and preciſely, and not in a general manner, though the general anſwer may amount to a full denial of the charges.

Although the defendant by his anſwer denies the title of the plaintiff, yet in many caſes he muſt make a diſcovery prayed by the bill, though not material to the plaintiff's title, and though the plaintiff, if he has no title, can have no benefit from the diſcovery. As if a bill is filed for tythes, praying a diſcovery of the quantity of land in the defendant's poſſeſſion, and of the value of the tythes; though the defendant inſiſts upon a modus, or upon an exemption from payment of tythes, or abſolutely denies the plaintiff's title [e], he muſt yet anſwer to the quantity of land, and value of the tythes [f]. Or if a bill is filed againſt an executor, by a creditor of the teſtator, the executor muſt admit aſſets, or ſet forth an account, though he denies the debt [g].

[d] Rules and Ord. in Ch. 99, 100. Ed. 1739.
[e] See, however, Gilb. 209.
[f] Hardr. 130.
[g] Hardr. 188.

If

If an anſwer goes out of the bill, to ſtate ſome matter not material to the defendant's caſe, it will be deemed impertinent, and the matter, upon application to the court, will be expunged. So in an anſwer, as in a bill, if any thing ſcandalous is inſerted, the ſcandal will be expunged by order of the court. But, as in a bill, nothing relevant can be ſcandalous [h].

It is the univerſal practice to add, by way of concluſion to an anſwer, a general traverſe, or denial, of all the matters in the bill. This is ſaid [i] to have obtained formerly, when the practice was, for the defendant merely to ſet forth his caſe by the anſwer, without anſwering every clauſe in the bill. But though, perhaps, rather impertinent if the bill is otherwiſe fully anſwered, and it has been determined to be in that caſe unneceſſary [k], yet it is ſtill continued in practice.

If a plaintiff conceives an anſwer to be inſufficient to the charges contained in the bill, he may take exceptions to it, ſtating ſuch parts of the bill as he conceives are not anſwered, and praying that the defendant may in ſuch reſpects put in a full anſwer to the bill. If the defendant conceives his anſwer to be ſufficient, or for any other reaſon does not ſubmit to anſwer the matters contained in the exceptions, one of the maſters of the court is directed to look into the bill, the anſwer, and the

[h] Moſely, 45. 70.
[i] 2 P. Wms. 87.
[k] 2 Wms. 87.

exceptions,

exceptions, and certify whether the anſwer is ſufficient in the points excepted to, or not. If the maſter reports the anſwer inſufficient in any of the points excepted to, the defendant muſt anſwer again to thoſe parts of the bill in which the maſter conceives the anſwer inſufficient; unleſs, by excepting to the maſter's report, he brings the matter before the court, and there obtains a different judgement. But if the defendant has inſiſted on any matter as a reaſon for not anſwering, though he does not except to the maſter's report, yet he is not abſolutely precluded from inſiſting on the ſame matter in a ſecond anſwer [l], and taking the opinion of the court whether he ought to be compelled to anſwer farther to that point, or not.

Where a defendant pleads, or demurs, and anſwers likewiſe, if the plaintiff takes exceptions to the anſwer, before the plea, or demurrer, has been argued, he admits the plea, or demurrer, to be good; for unleſs he admits them to be good, it is impoſſible to determine whether the anſwer is ſufficient, or not. Indeed if the plea or demurrer is only to the relief prayed by the bill, and not to any part of the diſcovery, it has been held that the plaintiff may take exceptions to the anſwer before the plea is argued [m]. If a plea, or demurrer, is accompanied by an anſwer to any part of the bill, even a denial of

[l] 2 Veſey, 491.
[m] 3 P. Wms. 327. Note S. See, however, 2 Atkyns, 390.

combination

combination merely, and the plea or demurrer is over-ruled, the plaintiff muſt except to the anſwer as inſufficient. But if a plea, or demurrer, is filed without any anſwer, and is over-ruled, the plaintiff need not take exceptions, and the defendant muſt anſwer the whole bill, as if no defence had been made to it [n].

A further anſwer is in every reſpect ſimilar to, and indeed is conſidered as forming part of, the firſt anſwer. So is an anſwer to an amended bill conſidered as part of the anſwer to the original bill [o]. Therefore if the defendant, in a farther anſwer, or an anſwer to an amended bill, repeats any thing contained in a former anſwer, the repetition, unleſs it varies the defence in point of ſubſtance, will be conſidered as impertinent [p]. If, upon reference to a maſter, ſuch parts of the anſwer are reported to be impertinent, they will be ſtruck out as ſuch, with coſts, which in ſtrictneſs are to be paid by the counſel who ſigned the anſwer.

If the defendant diſclaims all right, or title, to the matter in demand by the plaintiff's bill, the court will, in general, conſider the cauſe as inſtituted for vexation only, and diſmiſs the bill with coſts. But if the plaintiff ſhews a probable cauſe for exhibiting a bill, he may pray a decree againſt the defendant, upon the ground of the diſclaimer [q].

[n] Bunbury, 123.
[o] 3 Atkyns, 303.
[p] 3 Atkyns, 303.
[q] Prac. Reg. 41.

Where

Where the defendant diſclaims, the plaintiff is not to reply [r].

A defendant may demur to one part of a bill, plead to another, anſwer to another, and diſclaim as to another. But all theſe defences muſt clearly refer to ſeparate and diſtinct parts of the bill. For the defendant cannot plead to that part to which he has already demurred, neither can he anſwer to any part to which he has either demurred, or pleaded [s]; the demurrer demanding the judgement of the court whether he ſhall make any anſwer, and the plea whether he ſhall make any other anſwer than what is contained in the plea. Nor can the defendant by anſwer claim, what by diſclaimer he has declared he has no right to. A plea, or anſwer, will therefore over-rule a demurrer, and an anſwer a plea; and if a diſclaimer and anſwer are inconſiſtent, the matter will be taken moſt ſtrongly againſt the defendant upon the diſclaimer.

[r] Prac. Reg 141. [s] 2 Brown Parl Ca. 20, 21.

CHAP

CHAP. VI.

Of Replications.

A Replication is the plaintiff's anſwer, or reply, to the defendant's plea, or anſwer. Formerly, if the defendant by his plea, or anſwer, offered new matter, the plaintiff replied ſpecially [a]; otherwiſe the replication was merely a general denial of the truth of the plea, or anſwer, and of the ſufficiency of the matter alledged in it to bar the plaintiff's ſuit, and an aſſertion of the truth and ſufficiency of the bill. The conſequence of a ſpecial replication was a rejoinder, by which the defendant aſſerted the truth and ſufficiency of his anſwer, and traverſed every material part of the replication [b]. If the parties were not then at iſſue, by reaſon of ſome new matter diſcloſed in the rejoinder which required anſwer, the plaintiff might ſurrejoin to the rejoinder, and the defendant might in like manner adſurrejoin, or rebut, to the ſurrejoinder [c]. The inconvenience, delay, and unneceſſary length of pleading, ariſing from theſe various allegations on each ſide [d],

[a] Ord. Ch. Ed. 1698, 122. Prac. Reg. 215.

[b] 2 Weſt. Symb. Chan. 195. a. 32. b. 246. b.

[c] Weſt Symb. Chan. 195. a. Prac. Reg. 314.

[d] Ord. in Ch. Ed. 1698. 122.

occaſioned

occaſioned an alteration in the practice. Special replications, with all their conſequences, are now out of uſe [e]; and the plaintiff is to be relieved according to the form of the bill, whatever new matter may have been introduced by the defendant's plea, or anſwer [f]. But if the plaintiff conceives, from any matter offered by the defendant's plea, or anſwer, that this bill is not properly adapted to his caſe, he may obtain leave to amend his bill, and ſuit it to his caſe, as he ſhall be adviſed. To this amended bill the defendant may make ſuch defence as he ſhall think proper, whether required by the plaintiff to anſwer it, or not.

According to the preſent courſe of the court, although rejoinders are diſuſed, yet the plaintiff, after replication, muſt ſerve upon the defendant a ſubpœna, requiring him to appear to rejoin; unleſs he will appear gratis [g]. The effect of this proceſs is merely to put the cauſe completely in iſſue between the parties. For now, immediately after the defendant has appeared to rejoin, or after the return of the ſubpœna to rejoin; which, by order obtained of courſe, is now uſually made returnable immediately; the parties may proceed to the examination of witneſſes to ſupport the facts alledged by the pleadings on each ſide [h]. If, by miſtake, a replica-

[e] Prac. Reg. 315.
[f] Prac. Reg. 315.
[g] Moſely, 123 296.
[h] Moſely, 296. Prac. Reg. 314.

tion,

tion has not been filed, and yet witneſſes have been examined, the court will permit the replication to be filed *nunc pro tunc* [i].

Thus are the pleadings brought to a termination; for after examination of witneſſes they cannot be altered, unleſs under very ſpecial circumſtances, or in conſequence of ſome ſubſequent event. For if the plaintiff at any time diſcovers that he has not made proper parties to his bill, he may obtain leave to amend his bill, for the ſpecial purpoſe of adding the neceſſary parties [k]; but after witneſſes examined, and publication paſſed, the bill can be amended for no other purpoſe. And if any event happens, which alters the intereſt of any party, or gives any new intereſt to any perſon not a party, the plaintiff may file a ſupplemental bill, or bill of revivor, as the occaſion may require. If too the plaintiff thinks ſome diſcovery from the defendant, which he has not obtained, is neceſſary to ſupport his caſe, he may file a ſupplemental bill to obtain that diſcovery [l]. And if upon hearing the cauſe, the plaintiff appears intitled to relief, but the caſe made by the bill is inſufficient to ground a complete decree, the court will frequently give the plaintiff leave to file a ſupplemental bill, to bring the neceſſary matter, in addition to the caſe made by the original bill, before the court [m]. If the addition of parties only is wanted,

[i] Moſeley, 296.

[k] 2 Atkyns, 15. 3. Atkyns, 370.

[l] 1 Ch. Rep. 142. 3 Atkyns, 370.

[m] 3 Atkyns, 133.

an

an order is uſually made for the cauſe to ſtand over, with liberty to amend the bill by adding the proper parties. But, in general, with reſpect to the original parties, and their intereſts, no amendment will be permitted after the cauſe is at iſſue, and witneſſes have been examined, and publication paſſed; though a plaintiff has been permitted, even under ſuch circumſtances, to amend his bill, by adding a prayer omitted by miſtake [n].

[n] 3 Atkyns, 583.

FINIS.